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IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

CITIZENS TO PRESERVE OVERTON )  
PARK, INC. )  
192 Williford St., Memphis, Tenn. )

WILLIAM W. DEUPREE, SR., )  
1730 Glenwood Pl., Memphis, Tenn. )

SUNSHINE K. SNYDER, )  
327 Kenilworth Pl., Memphis, Tenn. )

SIERRA CLUB, )  
220 Bush St., San Francisco, Calif. )

NATIONAL AUDUBON SOCIETY, )  
1130 5th Ave., New York, N.Y. )

vs. )

CIVIL NO. C-70-17

JOHN A. VOLPE, )  
Sec. of Dept. of Transportation )  
Federal Office Bldg. )  
10-800 Independence Ave., S.W. )  
Washington, D.C. )

CHARLES W. SPEIGHT, )  
Commissioner )  
Tennessee Department of Highways )  
Highways Building )  
Nashville, Tennessee )

**RELEVANT DOCKET ENTRIES**

1/28/70

Filed copy of Order transferring case from District of Columbia to Western District of Tennessee, including the following papers: Complaint, summons and return, Motion for Preliminary Injunction, Affidavit of Arlo I. Smith, Affidavit of Sunshine Kidd Snyder, Affidavit of Sunshine

Kidd Snyder, Motion for Change of Venue, Order denying Motion for Change of Venue, Motion to Dismiss, Amendment of complaint, Affidavit of John W. Vardaman, Jr., Plaintiffs' response to Defendant's Motion to Dismiss, Notice of Deposition, Motion for Protective Order, Motion to Dismiss amended complaint, Response to Defendant's Motion for Protective Order, Response to Government's Motion to Dismiss Amended Complaint, Response to Defendant's Motion for Protective Order, Response to Government's Motion to Dismiss Amended Complaint, Affidavit of Charles H. Callison and Order granting defendant's Motion for Protective Order.

- 2/3/70 Filed Amended Complaint for Declaratory Judgment and Injunction.
- 2/5/70 Filed Plaintiff's Additional Motion for Preliminary Injunction.
- 2/20/70 Filed Motion to Dismiss on behalf of defendant, Charles W. Speight, Commissioner, Department of Highways.
- 2/20/70 Filed Affidavit of Virgil A. Rawlings, filed on behalf of Charles W. Speight, Commissioner, State of Tennessee, Department of Highways—exhibit attached.
- 2/20/70 Filed Affidavit of Henry Loeb, Mayor of the City of Memphis, filed on behalf of Charles W. Speight, Commissioner, Tennessee Department of Highways.
- 2/20/70 Filed Affidavit of Thomas E. Maxon, City Engineer of the City of Memphis, filed on behalf of Charles W. Speight, Commissioner Tennessee Department of Highways.



- 2/20/70 Filed Affidavit of Hal S. Lewis, on behalf of Charles W. Speight, Commissioner, Tennessee Department of Highways.
- 2/20/70 Filed Affidavit of William S. Pollard, Jr., filed on behalf of Charles W. Speight, Commissioner, Tennessee Department of Highways.
- 2/20/70 Filed Resolution of Memphis Park Commission.
- 2/20/70 Filed Affidavit of Luther W. Keeler, filed by and on behalf of the defendant, Charles W. Speight, Commissioner with exhibits.
- 2/20/70 Filed Affidavit of Henry K. Buckner, Jr.
- 2/20/70 Filed Motion for Summary Judgment on behalf of defendant, John A. Volpe, etc.
- 2/26/70 Filed Memorandum Decision and Judgment. Motion of Plaintiffs for a temporary injunction denied and motion of defendants for Summary Judgment be granted and the action is dismissed. Copies handed Wm. Walsh, Charles Newman, U.S. Attorney Copies mailed Vardaman and David Pack and Hanover.
- 3/2/70 Filed Notice of Appeal by Citizens to Preserve Overton Park, Inc.—Memorandum and Decision and Judgment entered 2/26/70 and Orders set forth denying plaintiffs Motion for Preliminary Injunction and granting the defendant's Motion for Summary Judgment and Dismissing Action. Copies mailed Tom Turley, David Pack, Thomas Flannery, Alan Hanover, Donald Harris, Jr. and Donald C. Hays.
- 3/17/70 Filed Notice of Appeal by Sierra Club and National Audubon Society, Inc.

9/29/70	Opinion of Court of Appeals.
10/30/70	Order Denying Petition for Rehearing and Denying Application for Stay.
11/19/70	Judgment of Court of Appeals.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**COMPLAINT  
FOR DECLARATORY JUDGMENT AND INJUNCTION**

Plaintiffs, for their complaint against defendant herein,  
allege as follows:

**Nature of the Action,  
Jurisdiction and Venue**

1. This action for a declaratory judgment, injunction, and for such other and further relief as may be deemed necessary arises under the Constitution and laws of the United States, namely the Fifth and Fourteenth Amendments to the United States Constitution; 23 U.S.C. § § 128, 138, 102; and 49 U.S.C. § 1653(f). There exists between the parties an actual controversy, justiciable in character. The matter in controversy exceeds the sum of \$10,000, exclusive of interest and costs. This Court has jurisdiction under 5 U.S.C. §§ 701-706; 28 U.S.C. §§ 1331(a), 1332, 1361, 2201-02; and District of Columbia Code (1967 ed.) § 11-521. The defendant may be found in, has headquarters in, and resides in the District of Columbia in the official capacity in which he is named as defendant, or otherwise, and venue lies in the District of Columbia under 28 U.S.C. § 1391(b).

### **Plaintiffs**

2. Citizens to Preserve Overton Park is a Tennessee corporation which has its principal place of activity in Memphis, Tennessee. It was organized for the purpose of preserving, protecting and enhancing Overton Park as a park land and recreation area. Its organizers and members are residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active since 1964 in efforts to preserve and protect Overton Park as a park land and recreation area.

3. Mr. William W. Deupree is the owner of property located at 1730 Glenwood Place, Memphis, Tennessee. He is a taxpayer of the City of Memphis, the State of Tennessee and the United States.

4. Mrs. Sunshine K. Snyder is an owner of property located at 327 Kenilworth Place, Memphis, Tennessee which is approximately 1150 feet away from the proposed route of Project No. I-40-1(90)3 (as described in paragraph 7 below). That property will be adversely affected by the construction of that Project and its use as an Interstate Highway. Mrs. Snyder pays taxes to the City of Memphis, the State of Tennessee and the United States.

### **Defendant**

5. Defendant John A. Volpe is the Secretary of the Department of Transportation and as such has responsibility for the administration of the various federal-aid highway programs, including that relating to the National System of Interstate and Defense Highways (the "Interstate System") of which Project No. I-40-1(90)3 is a part.

### **Overton Park**

6. Overton Park is a 342-acre park and recreation area located in midtown Memphis, Tennessee. Since 1901 it has been publicly owned by the City of Memphis. Within the

Park are located the Overton Park Zoo, a 9-hole municipal golf course, an outdoor theater, an art gallery, an art academy, a nature trail, a bridle path, a small lake, a formal garden, picnic areas and playgrounds and substantial woodland. In 1967 approximately 1½ million people visited the Zoo alone.

### **Project No. I-40-1(90)3**

7. Federal-Aid Highway Project No. I-40-1(90)3 (the "Project") is a six-lane, limited access, interstate highway to be used for private and commercial purposes which is a portion of Interstate Route 40. The Project will begin at McLean Boulevard in Memphis, Tennessee and extend eastward proceeding through the entire width of Overton Park, a distance of approximately 4,800 feet, and then extend to Maris Street. At the western end of Overton Park, the Project will be approximately 250 feet in width; at the eastern end it will be approximately 450 to 500 feet in width. There will be a 1200-foot access ramp within the eastern end of the park. The Project will include a 40-foot median strip between the eastbound and westbound lanes. The current plans contemplate that the Project will vary between being slightly depressed in some areas to a five- to six-foot fill at Lick Creek. It will not be tunneled. The Project will require the use of at least approximately 26 acres of Overton Park. It will affect adversely many more acres. The right of way for the Project runs along one side of the Zoo, one side of the playgrounds, and the playing fields, passes by the tip of the lake, and then passes through a heavily wooded area of the Park. Construction of the Project and its use as an interstate highway will have an adverse effect on the Zoo, the playing fields, use of the lake and will require the destruction of some of the wooded area of the Park.

8. On April 19, 1968, the Federal Highway Administrator preliminarily approved the proposed location of the Project.

9. On or about June 4, 1969, the Department of Highways for the State of Tennessee (hereinafter the "Tennessee Highway Department") requested that the defendant or his subordinates approve a design of the Project which the Tennessee Highway Department submitted to the United States Bureau of Public Roads. On or about November 5, 1969, Defendant Volpe approved that proposed design. Alternatively Defendant Volpe approved that design on the condition that the design be modified in accordance with certain requirements which he stipulated. The Tennessee Highway Department has given notice that the design of the Project will be modified according to Defendant Volpe's stipulation.

10. On or about November 10, 1969, the City of Memphis transferred to the State of Tennessee property in Overton Park for the right of way for the Project. The Tennessee Highway Department has stated that on or about December 19, 1969, it proposes to take bids for construction of parts of the Project, including a part of the Project which will pass through Overton Park.

11. The Tennessee Highway Department is proceeding with the construction of the Project on the assumption that it will receive from the Federal Government, pursuant to an obligation undertaken by Defendant Volpe, reimbursement of up to 90 percent of the costs of the construction of the Project. The Tennessee Highway Department would not proceed with construction of the Project if it believed that such federal funds could not lawfully be paid to the State of Tennessee.

12. If Defendant Volpe is enjoined from taking any further action with respect to the Project or enjoined from obligating the Federal Government to reimburse, or from reimbursing or paying, the Tennessee Highway Department 90 percent of its cost of the construction of the Project, the Tennessee Highway Department will not construct the Project through Overton Park. Unless Defendant Volpe is so restrained, the Tennessee Highway Department will begin construction of that part of the Project which passes through Overton Park immediately after taking bids.

**Violations of Federal Statutes**  
**23 U.S.C. § 128**

13. Section 128 of Title 23 provides:

“(a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

“(b) When hearings have been held under subsection (a), the State highway department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification.”

Paragraph 8.c(1) of the Policy and Procedure Memorandum 20-8 (hereinafter PPM 20-8), 34 Fed. Reg. 727 (1969) 23 C.F.R. App. A, promulgated by the Department of Transportation to implement 23 U.S.C. § 128 provides:

“(1) The State highway department shall provide for the making of a verbatim written transcript of the oral proceedings at each public hearing. It shall submit a copy of the transcript to the division engineer within a reasonable period (usually less than 2 months) after the public hearing, together with:

“(a) Copies of, or reference to, or photographs of each statement or exhibit used or filed in connection with a public hearing.

"(b) Copies of, or reference to, all information made available to the public before the public hearing."

Paragraph 8.b(2) provides:

"(2) Provision shall be made for submission of written statements and other exhibits in place of, or in addition to, oral statements at a public hearing. The procedure for the submissions shall be described in the notice of public hearing and at the public hearing. The final date for receipt of such statements or exhibits shall be at least 10 days after the public hearing."

14. On May 19, 1969, the Tennessee Highway Department held a public hearing with respect to the Project. According to the notice published by the Tennessee Highway Department the objectives of the hearing were:

"to provide the local officials and other citizens with complete factual information with respect to the tentative schedules for right-of-way acquisition and construction, and the location, the design features, and the economic, social and environmental effects which the project will have on the community and to acquaint the public with the relocation assistance offered by the State to those persons whose homes or businesses may be affected because of the proposed construction of said project.

"Following the presentation the local officials and citizens will be afforded the opportunity to be heard relative to the project to provide the Department with factual information which is pertinent to the specific location and major design features, including the social, economic, environmental and other effects thereof, which will best serve the public interest."

15. On or about June 4, 1969, a transcript containing some of the testimony given at the May 19, 1969, hearing was submitted to the Bureau of Public Roads. The Tennessee Highway Department, by Mr. Henry K. Buckner, certi-

fied to the Bureau of Public Roads that the transcript was a partial true transcript of all that was said at this hearing. It also certified that,

“the Department of Highways has considered the economic and social effects of the location of the project, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the affected community.”

16. The transcript of the public hearing held on or about May 19, 1969, which the Tennessee Highway Department submitted to the Defendant Volpe, did not contain testimony of at least eight witnesses who appeared and gave oral testimony at that hearing. Six of those witnesses opposed either, or both, the location and the design of the Project.

17. The Tennessee Highway Department has not submitted to Defendant Volpe a copy of the verbatim written transcript of the oral proceeding at the public hearing held on or about May 19, 1969, with respect to the Project. Defendant Volpe's approval of the Project without having received such a transcript violated 23 U.S.C. § 128(b) and PPM 20-8, Paragraph 8.c(1).

18. The notices of the public hearing scheduled for May 19, 1969, published in the Commercial Appeal, Memphis, Tennessee, on April 15, 1969, and May 12, 1969, did not describe the procedure for submission of written statements and other exhibits in place of, or in addition to, oral statements at the public hearing. These notices did not comply with 23 U.S.C. § 128 and the rules promulgated thereunder by the Department of Transportation, including PPM 20-8, Paragraph 8.b(2), 34 Fed. Reg. 727 (1969), 23 C.F.R. App. A. In the absence of proper notices, the hearing on May 19, 1969, did not comply with 23 U.S.C. § 128 including the rules promulgated thereunder by the Department of Transportation including PPM 20-8, Paragraph 10.d. Defendant Volpe's approval of the Project in the absence of the hearings that comply with Section 128 is illegal.



## 23 U.S.C. § 138, 49 U.S.C. § 1653(f)

19. Section 138 of Title 23, United States Code, provides:

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

20. Construction of the Project will require use of a number of acres of park land and recreation area from Overton Park. Overton Park is a park and recreation area of state and local significance. Overton Park has been determined by the state and local officials having jurisdiction thereof to be of state and local significance.

21. Neither Defendant Volpe nor any previous Secretary of Transportation has made any finding that there is no feasible and prudent alternative to the use of such public

park and recreation areas. Defendant Volpe has made no finding that the program for the Project includes all possible planning to minimize the harm to such park and recreation areas. In the absence of such findings, his approval of the Project has violated 23 U.S.C. § 138 and 49 U.S.C. § 1653(f).

22. There are feasible alternatives to the use of such park and recreation areas. One or more of the feasible alternatives are prudent alternatives. The Project does not include all possible planning to minimize harm to such park and recreation areas.

### 23 U.S.C. § 102

23. Defendant Volpe plans to treat his approval of the Project as a contractual obligation of the Federal Government and to make expenditures to the State of Tennessee pursuant thereto. Because that approval, having been given in violation of 23 U.S.C. §§ 128, 138, and 49 U.S.C. § 1653 (f), is null and void and without legal effect, such expenditures will violate 23 U.S.C. § 102.

### Prayer

WHEREFORE, Plaintiffs pray as follows:

1. That the actions and proposed actions of the defendant alleged herein be declared and adjudged unlawful;
2. That the defendant be permanently enjoined from taking any further action whatever relating to the Project unless and until he has complied with the provisions of Title 23 of the U.S. Code, and other statutes referred to herein;
3. That pending disposition of this action, this Court preliminarily enjoin the defendant from (1) taking any further action with respect to the Federal-Aid Highway Project No. I-40-1(90)3 ("the Project"), (2) treating the approval of the design of the Project which defendant granted on or

about November 5, 1969, as a basis for any further action with respect to that Project, or (3) obligating or disbursing any funds to the Department of Highways for the State of Tennessee for this Project.

4. That the plaintiffs recover costs and attorney fees; and

5. That the plaintiffs have such other and further relief as the Court may deem appropriate.

/s/ John W. Vardaman, Jr.  
 Wilmer, Cutler & Pickering  
 900-17th Street, N.W.  
 Washington, D.C. 20006  
 Telephone: 296-8800

Of Counsel:

*Attorney for Plaintiffs*

Wilmer, Cutler & Pickering  
 900-17th Street, N.W.  
 Washington, D.C. 20006  
 December 2, 1969

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UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

State of Tennessee	)	
	)	AFFIDAVIT OF
SS	)	
	)	Arlo I. Smith
County of Shelby	)	

I, Arlo I. Smith, after being duly sworn, depose and say:

1. I am chairman of the Citizens to Preserve Overton Park, a civic association which has its principal place of activity in Memphis, Tennessee. The association was organ-

ized in 1964 for the purpose of preserving, protecting and enhancing Overton Park as a park land and recreation area. Among the association's activities have been attending meetings and hearings to oppose and to suggest alternatives to the proposed Federal Aid Highway Project No. I-40-1 (90)3, hereinafter "the Project" and any other encroachments upon Overton Park. We have also contacted the Park Commission and other agencies within the city to make suggestions concerning excessive parking in Overton Park, the establishment of nature trails and guides for Overton Park and other suggestions all designed to enhance and preserve Overton Park and other parks in Memphis as park lands and recreation areas. The association is composed of individuals who reside in Memphis, who use Overton Park as a park land and recreation area, and who are tax payers of the State of Tennessee.

2. For the past several years I have tried to follow closely all proposals, actions and developments relating to the construction of the proposed Project, or any other highway project which would pass through or otherwise affect Overton Park. This activity has included research and study concerning the activity of Memphis City Council, the Department of Highways for the State of Tennessee, the Department of Transportation and the Memphis Park Commission. As a result of these activities, and on information and belief, I believe the following actual assertions to be true and correct.

3. Mr. William W. Deupree, Sr., is the owner of property located at 1730 Glenwood Place, Memphis, Tennessee. He is a tax payer of the City of Memphis and the State of Tennessee.

4. Mrs. Sunshine K. Snyder is the owner of property located at 327 Kenilworth Place, Memphis, Tennessee, which is approximately 1150 feet away from the proposed route of the Project. That property will be adversely affected by the construction of that Project and its use as an Interstate Highway.

5. Defendant John A. Volpe is the Secretary of the Department of Transportation and as such has responsibility for the administration of the various federal-aid highway programs, including that relating to the National System of Interstate and Defense Highways (the "Interstate System") of which the Project is a part.

6. Overton Park is a 342 acre park and recreation area located in midtown Memphis, Tennessee. Since 1901 it has been publicly owned by the City of Memphis. Within the Park are located the Overton Park Zoo, a 9-hole municipal golf course, outdoor theater, nature trail, bridle path, art academy, art gallery, playgrounds, small lake, formal garden, and picnic areas. Its 155-170 acres of Oak-Hickory climax forest is over half of the woodland park land in Memphis as of 1965. It is estimated by the Zoo Director that in 1967 approximately 1½ million people visited the Zoo alone. I would estimate that many additional people visited the park that year. Official figures for 1968 are not available at this time. An officially recognized Boy Scout Trail is used annually by scouts from ten states.

7. The Project is a six-lane, limited access, interstate highway to be used for private and commercial purposes which will be a portion of Interstate Route 40. The Project will begin at McLean Boulevard in Memphis, Tennessee, and extend eastward proceeding through the entire width of Overton Park, a distance of approximately 4,800 feet, and then extends to Maris Street. At the western end of Overton Park, the Project will be approximately 250 feet in width; at the eastern end it will be approximately 450-500 feet in width. There will be a 1200 foot access ramp on the east side within the park. The Project will include a 40-foot median strip between the eastbound and westbound lanes. The current plans contemplate that the Project will be variously slightly depressed from grade to 5-6 feet fill at Lick Creek, but not tunneled. The Project will require the use of at least approximately 26 acres of Overton Park. It will affect adversely many more acres.

8. On April 19, 1968, Federal Highway Administrator L. K. Bridwell preliminarily approved the proposed location of the Project, but not the design.

9. On or about June 4, 1969, the Department of Highways for the State of Tennessee submitted to the United States Bureau of Public Roads a design for the Project and requested approval of that design. On or about November 5, 1969 Defendant Volpe announced that he had approved the proposed design of the Project submitted by the Department of Highways for the State of Tennessee, but with certain design modifications to be submitted for approval. The Tennessee Department of Highways has given notice that the design of the Project will be modified according to recommendation which Defendant Volpe made in approving the design.

10. On November 10, 1969 the City of Memphis transferred to the State of Tennessee property in Overton Park for the right of way for the Project. The State Department of Highways has announced that on December 19, 1969 it proposes to take bids for construction of parts of the Project, including a part of the Project which will pass through Overton Park.

11. Prior to Defendant Volpe's approval on November 5, the Mayor of Memphis and state highway officials made numerous public statements that the construction of the Project would have to await Volpe's approval of the design. On occasion they have stated that if he did not approve the Project, the Expressway would not be built. On information and belief, the Department of Highways of the State of Tennessee is proceeding with construction of the Project upon the assumption that in due course it will receive from the Federal Government, pursuant to an obligation undertaken by Defendant Volpe, 90 percent of the cost of the construction of the Project. On information and belief, the Department of Highways for the State of Tennessee would not proceed with construction of the Project if it believed that such federal funds could not lawfully be paid to the State of Tennessee.

12. On information and belief, if Defendant Volpe is enjoined from taking any further action with respect to the Project or enjoined from reimbursing or paying the Department of Highways for the State of Tennessee 90 percent of its cost of the construction of the Project, the Highway Department of Tennessee will not construct the Project through Overton Park. Unless so restrained, the Department of Highways for the State of Tennessee will begin construction of that part of the Project which passes through Overton Park immediately after taking bids and signing contracts.

13. Notices announcing a public hearing to be held on May 19, 1969 with respect to the Project were published in the Commercial Appeal, on April 15, 1969 and on May 12, 1969. Copies of those notices are attached hereto as Exhibits A and A-1.

14. I attended that hearing and was present from the beginning until the end of the hearing. The representatives of the Department of Highways for the State of Tennessee did not give a complete factual presentation on the dimensions, full design of the Project and upon the environmental and social impact on Overton Park and the surrounding neighborhoods. Mr. Sam Morrison, the State Highway engineer who was scheduled to be the first witness to present such information left the hearing without testifying and without hearing all of the testimony given. Also, Mr. Douglas Warpole, Chief of Data Interpretation, did not make his scheduled presentation. At least 13 witnesses appeared and testified orally in opposition in either to the alignment or design of the Project. Thirteen additional individuals and associations submitted statements opposing the Project.

15. A transcript containing some of the testimony given at the May 19, 1969 hearing was submitted to the Bureau of Public Roads. On June 4, 1969 Mr. Henry K. Buckner certified to the Bureau of Public Roads that the transcript was a partial true transcript of all that was said at this hearing. He also certified that,

"the Department of Highways has considered the economic and social effects of the location of the project, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the affected community."

A copy of that certification is attached hereto as Exhibit B.

16. The Citizens to Preserve Overton Park learned for the first time by letter to me dated July 16, 1969, from Clarence E. Elkins, Jr., Staff Attorney, that the transcript did not contain the testimony of all the witnesses who testified at the May 19, 1969 hearing. A copy of this letter is attached as Exhibit C.

17. By letter dated May 21, 1969, Mr. Henry K. Buckner, Jr., Attorney for the Department of Highways for the State of Tennessee, stated that he would provide Mrs. Sara N. Hines with a copy of the transcript of the May 19, 1969 hearing. A copy of that letter is attached as Exhibit D. Mr. Buckner sent a copy of that transcript, which he stated had been submitted to the Bureau of Public Roads, to Mrs. Hines on October 27, 1969. I have examined a copy of the transcript of the May 19, 1969 hearing, which was provided to Mrs. Hines. That transcript does not contain the testimony of the last eight witnesses who appeared and gave oral testimony at that hearing. Six of those witnesses opposed either, or both, the design or the location of the Project. These witnesses include the widow of a direct descendant of the man for whom Overton Park is named, two officials of the Department of the Interior, and a representative of the National Recreation & Park Association, and, in addition myself, as Chairman of Citizens to Preserve Overton Park. The transcript also omitted questions which I asked with respect to: dates, locations, and by whom alternate routes were presented to the Citizens of Memphis; and the names of both engineering and non-engineering personnel who served as consultants for the State Highway



Department. These questions have yet to be answered, although Mr. Buckner promised them.

18. By letter of July 18, 1969, Mr. John S. Logan informed the secretary of Citizens to Preserve Overton Park that all those witnesses whose testimony was not included would be contacted "within the next few days." He also informed her that the "public hearing transcript and attachments were forwarded to the Washington office of the Bureau of Public Roads on June 24, 1969." A copy of that letter is attached as Exhibit E.

19. At least one of those witnesses has not been contacted by the State Highway Department or the Department of Transportation concerning his testimony.

20. If the Project is constructed according to the plans announced at the May 19, 1969 hearing, it will require the use of a number of acres of park land and recreation area from the Overton Park. Overton Park is a park land and recreation area of state and local significance and has been determined so by state and local officials having jurisdiction over the Park. The Memphis Park Commission passed a resolution in 1964 opposing the location of the highway in Overton Park. In a letter dated November 8, 1968, the Director of the Park Commission characterized Overton Park as "the outstanding park in the city . . ." A copy of that letter is attached as Exhibit F.

21. In 1958 the firm of Harland Bartholomew & Associates made a report to the Department of Highways for the State of Tennessee entitled "Alternate Location Study Routes F.A.I. 505." That report showed alternative routes for the Project which would avoid Overton Park and avoid the use of the park land and recreation area.

22. On or about March 5, 1968, the Memphis City Council unanimously passed a resolution opposing the present location of the Project. A copy of that resolution is attached as Exhibit G.

23. On April 3, 1968, Mr. Lowell K. Bridwell, Federal Highway Administrator met in Memphis with the City Council. No member of the Citizens to Preserve Overton Park was allowed to attend the meeting. By a letter to me dated June 21, 1968, Mr. Alan Boyd, the then Secretary of Transportation, stated that Mr. Bridwell had requested that a transcript be made of the April 3, 1968 meeting. Mr. Boyd stated that a transcript was not made because the recording equipment provided by the City Council was not operative. A copy of that letter is attached as Exhibit H.

24. On April 4, 1968, the City Council passes a resolution stating, among other things, that "Overton Park is the feasible and prudent location for said route . . ." A copy of that resolution is attached as Exhibit I.

25. On May 28, 1968 Lowell K. Bridwell gave the following testimony concerning the Project to the Subcommittee on Roads of the Senate Committee on Public Works.

"We went to the city council of Memphis and we said, 'Yes, there are alternatives. We won't even give you any information on what the alternatives cost in dollars because we don't want that to be a factor in your recommendation of which line to choose. Rather, we would like you to focus upon the conflicting set of community values that are inherent in this kind of a situation.'

"We told them that a highway could be built through the area on almost any conceivable line that they could pick, that engineeringly it was feasible, that we refused to give them any information as to cost, the primary reason being that Memphis was not involved in the cost of it one way or the other, but rather to concentrate upon the conflicting set of community values that were inherent in each one of the alternatives." Hearings on Urban Highway Planning, Location, and Design Before the Subcommittee on Roads of the Senate Committee on Public Works, 90th Cong. 1st & 2nd Sess., pt. 2, p. 478.

26. One or more of these feasible alternatives are prudent alternatives.

27. The Project as approved by Defendant Volpe does not include all possible planning to minimize harm to the Park and recreation areas. In announcing Defendant Volpe's approval of the design, Mr. J. D. Braman is reported in a Department of Transportation news release as saying, "The state also has agreed to take all steps possible to minimize the harm to the park resulting from the highway." There are additional measures which the state has not agreed to take which could be taken and would minimize the harm to the park land and recreation area. One such example would be to place the Expressway in a tunnel under Overton Park.

28. On information and belief Defendant Volpe has made no finding that there is no feasible and prudent alternative to the use of such public park and recreation areas. Defendant Volpe has made no finding that the program for the Project includes all possible planning to minimize the harm to such park and recreation areas.

29. On information and belief Defendant Volpe plans to treat this approval of the Project as a contractual obligation of the Federal Government and to make expenditures to the State of Tennessee pursuant thereto.

/s/ Arlo I. Smith

November 25, 1969

[Subscription and Exhibits A-E omitted in printing]

## [Exhibit F]

November 8, 1968

Mr. Frank Holloman, Director  
Division of Fire & Police  
City of Memphis—City Hall  
125 North Main Street  
Memphis, Tennessee, 38103

Re: *Fire Station No. 13—Overton Park.*

Dear Mr. Holloman:

The Memphis Park Commission in regular meeting of yesterday's date, November 7, 1968 went on record as being firmly opposed to the construction of a Fire Station in Overton Park. The Park Commission respectfully requests that some other site be selected for this Station. This is the outstanding park in the City and we have had numerous expressions of protest to this proposed taking of park land for a Fire Station site. There was a very out-spoken group present at yesterday's Board meeting protesting this action and the Park Commission was in complete agreement.

While in sympathy with the situation faced by the Fire Department in relocating this facility the Park Commission does not feel that Park land should be taken for this use.

Yours very truly,

H. S. Lewis,  
Executive Director  
Memphis Park Commission

HSL:vlc

c.c. Harry Woodbury, Director  
Division of Public Service  
Mayor Henry Loeb

**[Exhibit G]****RESOLUTION RELATIVE TO EXPRESSWAY THROUGH  
OVERTON PARK**

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF MEMPHIS that the Department of Highways of the State of Tennessee, the Bureau of Public Roads of the Federal Government, and all other proper authorities and agencies, be advised that the Council of the City of Memphis prefers that the Expressway through Overton Park be not routed in its present proposed location but that the said proper authorities select another feasible route, with the provision that if no better route can be obtained, the route using the north perimeter of Overton Park and the South part of North Parkway Boulevard be chosen.

BE IT FURTHER RESOLVED that copies of this Resolution be sent to the said proper authorities informing them of this decision.

I hereby certify that the foregoing is a true copy and said document was adopted approved by the council of the City of Memphis in regular-special session on the Mar 5, 1968

/s/ R. E. [Illegible]  
Dep. Comptroller

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**[Exhibit H]**

THE SECRETARY OF TRANSPORTATION  
WASHINGTON, D.C. 20590

June 21, 1968

Mr. Arlo I. Smith, Director  
Citizens to Preserve Overton Park  
192 Williford Street  
Memphis, Tennessee 38112

Dear Mr. Smith:

I appreciate receiving your letter of April 20 and your expression of continued concern over the location of Interstate Route 40 through Overton Park as well as your feeling that the public has not been adequately informed on

how the decision was made. I also have your letter of May 25 which discusses my recent HOLIDAY Award and which relates the Overton Park problem to our actions in Baltimore and the Washington area.

Concerning your earlier letter, Mr. Bridwell has informed me of his meeting with you and others who have a great interest in the preservation of Overton Park and his telephone conversations with you.

It is unfortunate that no representative of the Citizens to Preserve Overton Park was invited to the April 3rd meeting between Mr. Bridwell and members of the City Council. As Mr. Bridwell explained on the telephone, he requested that a transcript be made of the meeting. However, when the meeting started it developed that the recording equipment provided by the City Council was not operative so there was no way to make a transcript. Had we any reason to believe that our request for a transcript would not be met, we would have arranged for a stenographer to be present to provide verbatim transcript.

At the meeting on April 3rd, Mr. Bridwell told members of the Council that the Department of Transportation had no final decision on the location of the route. Four alternatives were discussed quite thoroughly and the effects of each of the alternatives were presented in detail to members of the Council. At the outset of the meeting, Mr. Bridwell told members of the Council that he would not give any information on costs of the various alternatives nor would he answer any questions on cost because he did not want that to be a factor in the Council's consideration. He stated, instead, that any alignment of I-40 through Memphis would have disruptive effects upon established sections of the City. He explained that any alignment would bring into focus conflicting sets of community and social values and the resolution of these issues was best left to the elected representatives of the people of Memphis.

Accordingly, Mr. Bridwell used maps, aerial photographs and other graphic material to explain the effects of alignments north of the Park, south of the Park, along the north

edge of the Park and the original route proposed by the Tennessee Department of Highways. The effects of each alignment were discussed in considerable detail and members of the Council had the opportunity to ask any questions or present any points of view. The Council further was told that all of the material presented to it at the meeting would be left with members for their further study and that any additional questions they had would be answered or any additional information they wanted would be supplied.

As you are aware, the City Council voted to go ahead with the route through the Park. It is my belief that members of the Council were given a full and fair presentation of all of the facts. A representative of my office attended the meeting as an observer.

With reference to the questions in your letter of May 25, I feel that Memphis and Overton Park have received perhaps more consideration than have Baltimore and Washington. Certainly the City Council's decision to retain the Park routing did give people and their homes and their schools and churches precedence over other considerations. The causes of conservation and beauty still are being given careful study in an all-out effort to make the highway a true asset to the Memphis community.

Now that the decision has been made on the specific alignment for the route, I have asked Mr. Bridwell to develop a number of specific design alternatives in order to minimize damage to the Park and its facilities. It will be our intention to do everything we reasonably can to offset the disruptive influence of the highway.

I understand and appreciate your disappointment in this position. If there is any other way that I can be helpful to you or provide additional information, please do not hesitate to write me.

Sincerely,

/s/ Alan S. Boyd

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**[Exhibit 1]****RESOLUTION CONCERNING EXPRESSWAY THROUGH  
OVERTON PARK**

WHEREAS, as a result of the Resolution the Council passed March 5, 1968, representatives of the Federal Government and the Department of Highways of the State of Tennessee have furnished the Council with considerable information and data to the effect that no other feasible and prudent route is available through Overton Park for Expressway I-40; and

WHEREAS, the Council has likewise been informed by the same agencies that its action to date has caused no delay in the building of this part of the expressway, but that further study and hearings could materially affect the beginning of the construction; and

WHEREAS, the Council realizes that the construction is very essential for the growth and progress of the City of Memphis.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF MEMPHIS, that the Council finds the route presently designated by the State of Tennessee and the Federal Government through Overton Park is the feasible and prudent location for said route and that the design as presently made is acceptable to the Council.

I hereby certify that the foregoing is a true copy and said document was adopted - approved by the council of the City of Memphis in regular - special session on the Apr 2, 1968.

/s/ C. W. Crutchfield  
Comptroller

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**AFFIDAVIT**

Edgar H. Swick, being duly sworn, deposes and says:

I am Deputy Director of the Bureau of Public Roads. In this position I have become personally familiar with the facts and circumstances of the location, design, and construction of Interstate 40 in Memphis, Tennessee.

The location of I-40 along the bus route through Overton Park was approved by the Bureau of Public Roads in 1956. All alternate alignments were rejected because of large displacements of persons, hospitals, schools, churches, and commercial establishments. For instance, the route immediately north of the park would have involved the taking of three schools, including Southwestern University and the largest high school in Memphis, plus churches attended by 4,000 people, industries, and the residences of more than 1,500 people. The route south of the park would have involved taking two schools, three churches attended by 7,500 people, 46 commercial establishments, residential units being occupied by over 3,000 persons and a hospital and home for the aged. Incidentally, the construction and right-of-way costs of the least expensive of these alternate routes would exceed the costs of the chosen route by many millions of dollars.

The 1956 determination that the only feasible and prudent location for the highway was on the present bus route through the park was reaffirmed by Federal Highway Administrator Whitton in 1966 [Exhibit A], Federal Highway Administrator Bridwell and Secretary of Transportation Boyd in 1968 [Exhibit B], and Federal Highway Administrator Turner and Secretary of Transportation Volpe in 1969 [Exhibit C]. As indicated in the hearing of the Subcommittee on Roads of the Senate Public Works,

90th Congress, 1st and 2d Sessions, pages 478-480, the City Council of Memphis determined that this was the only feasible and prudent location for the highway even without considering the cost of any possible location. On April 2, 1968, it passed a resolution approving this route. The plaintiffs do not name any other route as feasible and prudent.

Further, most of the right-of-way has been acquired and cleared on this project adjacent to the park. Such acquisition was authorized in May 1967. In the areas immediately east and west of the park, between where any alternate location for the road would leave the presently projected route until it would remerge with this projected route so as to avoid the park, all the right of way has been acquired, ninety-nine percent of the approximately 2,200 people formerly living there have been displaced, and seventy-five percent of the buildings demolished. A change of route at this time would require additional hardship, dislocations of people in areas paralleling the portions of the route already cleared, as well as the hardship dislocation of people along the portion of any new route out of the park.

The design of I-40 through the park is as compatible with park surroundings as possible. The possibility of tunnelling under the park was studied. However, in order to avoid damage to the tree roots, a bored tunnel would have to be placed 20 feet below the nature ground. This would cost an estimated \$107 million and involve overcoming difficult and risky construction problems in constructing this tunnel through water-bearing, loess-type soils. A cut and cover tunnel was also rejected as a possible alternative. Such a tunnel would not have preserved the existing park vegetation as it would have to be removed in order to proceed with the construction process. The cost of a cut and cover tunnel is estimated to be \$41.5 million [see Exhibit D].

Air pollution with either scheme would be concentrated near the ventilation shafts within the park. Freeway users would also be subject to an unpleasant tunnel atmosphere

in contrast with a surface road or a depressed road through the park. Tunnel construction of major highways also involves danger to the public safety as emergency vehicles have difficulty in the removal of stalled or wrecked vehicles in assisting in accidents involving fire in the tunnel. For these reasons, the concept of tunnelling through the park was not acceptable.

The proposed design, estimated to cost about \$3.5 million, is along an existing bus route through the park. The highway grade line has been depressed as much as is reasonably possible from an engineering standpoint. With the exception of the crossing of Lick Creek, the grade line is depressed so that traffic is essentially hidden from the park users' view. Lick Creek is the natural drainage facility to the Mississippi River in this section of Memphis. To maintain a grade line lower than Lick Creek would require an inverted syphon to carry the stream and would necessitate the pumping of highway drainage. Historically, areas where pumping is required in the City of Memphis have been subject to flooding at times of power failure, which is more prone to happen during severe storms when the pumping is essential. Further, the use of an inverted syphon under the highway would require an open pool creating a malarial hazard and danger to human and animal life.

The largely depressed and hidden highway planned takes but 26 of the 342 acres of the park. The highway is designed to be constructed near the northern boundary of the park, along an existing bus route, so as not to unduly harm the remainder of the park. With the exception of a portion of the parking lot for the zoo, none of the park features are being taken or changed in their use. The width of the highway cross-section has been minimized by the use of architecturally designed retaining walls so as to reduce the width of the highway. A 40-foot wide grass-covered median is proposed for both safety and aesthetic reasons. Elimination of such a median would provide substantial danger to the public and detract from the visual appearance

of the highway in the park. In addition, normal drainage ditches have been eliminated to reduce the total width of the highway. The entire highway will be landscaped in a manner consistent with the landscaping of the park.

The \$2.2 million to be paid to the City of Memphis by the State for the 26 acres near the northern boundary of the park has been specifically allocated by the City for 300 acres of new parkland and improvements to the zoo. One million dollars is committed for a single 160-acre city park, one million dollars for separate local park tracts totalling 140 acres, and the remaining \$200,000 for improvements to the zoo in Overton Park. [See Exhibit D.]

Further, the Secretary of Transportation, in approving this project has particularly required that maximum planning be done to minimize harm to the park [Exhibit C]. The features of this plan include, among others:

- Depression of the roadway to the maximum extent possible consistent with the requirements of drainage and possible safety in the area.

- A pedestrian crossing over the highway in the area of the zoo with a lower crown and a broad, natural-looking aspect that blends with the surroundings and provides for a visual continuity.

- Exploration of other pedestrian crossings.

- Continual study of beautifying the parkway to conform with landscaping to architectural renderings reviewed by the Secretary of Transportation.

The State has agreed to this planning to minimize harm to the park.

With the exception of a seven-mile gap in I-40 in downtown Memphis, including Overton Park, this Interstate highway is open to traffic or nearing completion between Nashville, Tennessee, and Little Rock, Arkansas.

This agency has examined the May 19, 1969, hearings conducted by the State of Tennessee and determined that

the hearings met the requirements of statute and regulation. The only alleged flaws in these hearings, pointed to in the complaint, involve the failure of the State to make and submit a full verbatim transcript as allegedly set out in paragraph 8.c(1) of Bureau of Public Roads' Policy and Procedure Memorandum (PPM) 20-8, and the failure to publish notice of provisions for the submission of written statements and other exhibits as set out in paragraph 8.b(2) of that Memorandum.

In regard to the requirements of paragraph 8.c(1) of the PPM, the State did literally "provide for the making of a verbatim written transcript of the oral proceedings . . ." It further did "submit a copy of the transcript to the division engineer." The State acknowledged to the defendant that although it made provision for a verbatim transcript, it did not obtain a full transcript because unknown to it during the hearing, the recording equipment failed. This agency then requested the State to contact all speakers whose statements they knew were not recorded, and to ask these speakers for written statements. The State subsequently advised us that they followed this course. The State did receive or solicit statements from each of the persons claimed at page 9 of the plaintiffs' brief to be the most important who testified: Mrs. Watkins Overton, Forrest V. Durand and Harry W. Rice of the Department of the Interior, Ben H. Thompson of the National Recreation and Park Association, and Arlo Smith of the Citizens to Preserve Overton Park [Exhibit E]. Mr. Thompson's statement was attached to the original hearing transcript [Exhibit F]. As the State of Tennessee had made provision for a verbatim transcript, had given us as complete a transcript as existed, and had solicited statements from those who spoke at the hearing without being recorded, it was concluded that Tennessee had followed the letter and spirit of paragraph 8.c(1) of our requirements. To date there has been no claim that any argument on design was not before the State and Federal Governments because of the failure of the recording equipment. It should be noted

that the National Park and Recreation Association, although opposed to the highway, particularly commend the State to us for the way it conducted the hearing [Exhibit F].

Further, responsible State highway officials did attend and conduct this design hearing. They included Harry K. Buckner, Jr., attorney for the Tennessee Department of Highways, and R. L. Iddins, Jr., the Assistant Design Engineer for that Department. Mr. Iddins was familiar with the location and represented the State as to both location and design at this hearing. In our view it was not necessary for a location engineer to attend this hearing.

In regard to the provisions of paragraph 8.b(2) we also concluded that the State complied with the memorandum. We do not view any failure to publish notice concerning the submission of written statements to require the vitiation of a hearing held and attended by hundreds of people. The affidavit annexed to the motion for a preliminary judgment itself indicates that any failure to give notice that written statements might be filed was technical and not substantive. It states that at least thirteen written statements were filed. Actually over 40 written statements were submitted. Further, there has been no claim to date that any matter concerning design, or even location, was not before the State or this Department because of this failure to publicize the solicitation of written statements. In this context, we have determined that the State complied with our regulations in the conduct of the design hearing.

This agency has further been informed by the State of Tennessee that construction on this route could not begin before February 1, 1970, and probably not before March 1, 1970.

/s/ Edgar H. Swick

[Subscription omitted in printing]

[EXHIBIT A]

ATTACHMENT TO AFFIDAVIT OF  
EDGAR H. SWICK

[Filed 2/18/70,  
No. 7 on Clerk's Certificate]

U.S. DEPARTMENT OF COMMERCE  
BUREAU OF PUBLIC ROADS  
REGION THREE  
Room No. 414  
226 Capitol Blvd. Bldg  
Nashville, Tennessee 37219

[Received Dec. 14, 1970]

January 27, 1966

Mr. Warner E. Dunlap  
State Highway Engineer  
State Highway Department  
Nashville, Tennessee

Subject: Tennessee - I-40 Location Through Overton  
Park in Memphis - Project I-40-1 (68)3 - Mr.  
Whitton's Letter to Commissioner Pack  
dated January 27, 1966

Dear Mr. Dunlap:

Mr. Whitton's letter of January 17, 1966, which I handed to Commissioner Pack on January 24, 1966, reaffirms our previous approval of your Department's selection of a location through Overton Park for a segment of I-40 in the City of Memphis.

You and I have today discussed the conditions to Mr. Whitton's action listed in the last paragraph of his letter, a copy of which is attached for your ready reference.

I will appreciate your advice as to the steps being taken by your Department to satisfy the conditions regarding the continuous evaluation of the design by qualified architect-

tural landscape personnel and the coordination of the aesthetic elements with the appropriate city officials.

Very truly yours,

/s/ J. C. Cobb  
Division Engineer

Attachment

cc: Mr. L. W. Keeler

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[Received Jan. 17, 1966]

39-30

Mr. David M. Pack, Commissioner  
Tennessee Department of Highways  
State Highway Department Building  
Corner 6th Avenue, North and  
Deaderick Street  
Nashville, Tennessee 37219

THROUGH:  
Mr. Harry E. Stark  
Regional Engineer

Mr. J. C. Cobb  
Division Engineer

Dear Mr. Pack:

Thank you for your August 23, 1965, letter concerning your reevaluation of the location of Interstate Route 40 in the vicinity of Overton Park at Memphis. I appreciate the thorough manner with which your department has approached this problem. It is a matter which fully deserves the most careful and serious consideration.

Since receiving your letter I have had our staff here and in our Atlanta and Nashville offices again make a thorough and deliberate review of the whole situation, which has now been completed. I have gone over with them their findings as well as reviewed the material made available by you and others. I have also made myself and our staff available to meet with anyone who has expressed an interest and we



have met with a number of people to receive their views and discuss the matter.

We find that the Tennessee Department of Highways has given adequate study and developed sufficient information to properly define the problem and on which to base a decision. We find nothing pertinent to this matter which you have not taken into consideration. Your conclusion that the location through the northern part of Overton Park represents the proper balance of the various factors involved in this area is well founded. We can offer no objections to your decision and reaffirm our previous approval of this location.

I have noted with special interest your remarks concerning the design of the highway through the Park area, particularly the aesthetic aspects. I strongly indorse the most exacting efforts to assure a finished product which is in keeping with the area and future Park usage. We consider this to be absolutely essential and for added emphasis make it a condition to our action. We ask that the design be subjected to continuous evaluation by qualified architectural landscape personnel as it progresses. The aesthetic elements should be fully coordinated with the appropriate city park officials so that a mutually acceptable plan is achieved.

Sincerely yours,

/s/ Rex M. Whitton  
Federal Highway Administrator

cc: Mr. Harry E. Stark  
Mr. J. C. Cobb

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## [EXHIBIT B]

FEDERAL HIGHWAY ADMINISTRATION  
Washington, D.C. 20591

FHWA-153

FOR RELEASE AT 11 A.M.  
FRIDAY, APRIL 19, 1968

*DOT APPROVES I-40 ROUTE  
FOR MEMPHIS OVERTON PARK*

The Department of Transportation today reconfirmed Federal approval of a proposal to route Interstate 40 through Overton Park in Memphis, Tennessee.

Federal Highway Administrator Lowell K. Bridwell said the action follows an April 5 resolution by the Memphis City Council which found the park route "feasible and prudent," thus ending years of dispute over the location.

Bridwell said today's decision affects only the location of the route. "In the actual design stage," he said "we will try to minimize as much as possible the impact of the highways on the park facility."

The location of the highway through Overton Park was first approved August 2, 1947. Bureau of Public Roads records show its approval was reaffirmed on January 17, 1966. The Memphis City Council, a month before its April 5 resolution, had voted against the park route. Much of the right-of-way leading up to the park already has been purchased.

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## [EXHIBIT C]

DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
Washington, D.C. 20590

*FOR RELEASE WEDNESDAY A.M.*  
November 5, 1969

DOT-24069  
Phone: (202) 963-5154

Secretary of Transportation John A. Volpe today announced he has approved, with significant qualifications, a proposal submitted by the Tennessee Department of Highways to construct a segment of Interstate Route 40 through Overton Park in Memphis, Tennessee.

Secretary Volpe said a "hold" on the project had been lifted after the state agreed to adjust the grade line of the depressed freeway to a point as low as possible. This grade line would still permit natural drainage in the area of Lick Creek, a small stream that flows through the 360 acre park near downtown Memphis.

J. D. Braman, Assistant Secretary of Transportation for Environment and Urban Systems, and one of Secretary Volpe's key advisors on environment and downtown highway systems, said, "The plan for Overton Park is the most reasonable now open to us and is designed to do minimum damage to the park. The options of this Administration were few, mainly because the route of the highway had previously been determined."

Secretary Volpe established the Office of Environment and Urban Systems soon after taking office on January 21 to advise him on environmental problems and to act as an intra-governmental liaison unit.

Braman said that in addition to depressing the highway, the state had agreed to build suitable pedestrian ways across the freeway to provide access to the zoo and portions of the park north of the freeway. Design of the aesthetic features are subject to Secretary Volpe's review, he added.

"The state also has agreed to take all steps possible to minimize the harm to the park resulting from the highway," Braman said.

Secretary Volpe's action clears the way for the state to pay the City of Memphis more than \$2 million to be used to replace the parklands lost to the freeway and for other improvements.

Secretary Volpe said he understood that some of the money is to be used to improve the Overton Park zoo and that an old golf course will be converted into a park.

Interstate 40 is a trans-continental freeway stretching about 2,348 miles from California through Arizona, New Mexico, Texas, Oklahoma, Arkansas, Tennessee, and North Carolina.

The location of the highway through Overton Park was first approved as part of the Memphis Highway System on August 2, 1947. Department of Transportation records show this approval was reaffirmed on January 17, 1967, and again on April 19, 1968 when the highway was incorporated into the Interstate System.

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## [EXHIBIT D]

Oct. 14, 1969

Mr. John A. Volpe, Secretary  
Department of Transportation

34-30

F. C. Turner  
by E. H. Swick

INFORMATION—Tennessee I-40 through Overton Park,  
Memphis, Tennessee

Enclosed is a brief report of the subject project for your  
information.

Enclosure

Bureau of Public Roads  
MIEspeland/JJKessler:msk  
(10-14-69)

Copies to:

FHWA Executive Secretariat (2)

DOT Executive Secretariat (3)

S-2

S-10

Signer

BPR File (RETURN TO  
PUBLIC ROADS)

cc: Files (2)

Mr. R. R. Bartelsmeyer

Mr. E. H. Swick

Mr. G. M. Williams,

Director, Office of

Eng. & Operations

CC Unit

Systems & Location

Division

Reader File - 812

October 14, 1969

Tennessee I-40 through Overton Park,  
Memphis, Tennessee

The Bureau of Public Roads originally approved the location of Interstate 40 through Overton Park in 1956. Studies of alternate alignments, now totaling greater than 20 in number, have continued to support this decision. The reason—alternate alignments around the park are infeasible because of the severe disruption this would cause to

the community through displacement of large numbers of people, businesses, schools and hospitals, in addition to causing severe traffic disruption to local streets. This decision has subsequently been reaffirmed by former Federal Highway Administrator Whitton in 1966 and again by former Administrator Bridwell and former Secretary of Transportation Boyd in 1968. Local officials also support the approved location.

The design of I-40 through the park has been given careful consideration in order to provide a highway that is fully compatible with the park surroundings. The possibility of tunneling under the park was carefully studied. In order not to damage tree roots, a bored tunnel would have to be placed some 20 feet below natural ground. The State estimated the construction costs for the bored tunnel to be approximately \$107 million and foresaw tremendous construction problems in having to bore through water-bearing, loess-type soils. This concept was considered as not being reasonably productive of benefits equal to the cost nor a prudent expenditure of public funds. A cut-and-cover tunnel, estimated to cost approximately \$41.5 million, was considered as a possible alternative. But such a tunnel would do little in the way of park preservation, since the natural existing vegetation would have to be removed in the construction process. Air pollution with either scheme would be concentrated at the ventilation shafts within the park. Freeway users would be subjected to an unpleasant tunnel atmosphere as well as to considerable hazard. Emergency vehicles would have difficulty reaching stalled or wrecked vehicles, and accidents involving fire would imperil all within the tunnel. For these reasons, the concept of tunneling under the park was abandoned.

The proposed design, estimated to cost about \$3.5 million, follows along an existing bus route through the park. The highway grade line has been depressed as much as reasonably possible. With the exception of crossing over Lick Creek, the grade line is depressed such that traffic is essentially hidden from the view of the park user. To

maintain a grade line lower than Lick Creek would require an inverted siphon to carry the stream and would necessitate the pumping of highway drainage. The city is adamantly opposed to this concept. Their contention is that should drainage be pumped, power failures would cause flooding which has already occurred at a similar installation elsewhere in Memphis. The city is also opposed to an inverted siphon because of its unusual maintenance problems, together with its hazard to human and animal life, and of possible health hazard and nuisance due to stagnant water.

The highway is taking less than 10 percent of the parkland, and with the exception of a portion of the zoo's parking lot, none of the park features are being taken or changed in their use. The width of the roadway cross-section has been minimized by the use of retaining walls, architecturally designed, to reduce the horizontal dimension of the highway. Although a 40-foot wide grass median is proposed for both safety and esthetic reasons, normal side ditches have been eliminated in favor of an underground drainage system in an effort to reduce the total width of the highway. The entire roadway will be fully landscaped in conformity with the park area.

With the exception of approximately a seven-mile gap, I-40 is now either open to traffic or nearing completion between Little Rock, Arkansas and Nashville, Tennessee. The gap referred to is in downtown Memphis and includes the section through Overton Park. The State has recognized the desirability of completing this last section of I-40. They have held the necessary public hearings, acquired and cleared most of the right-of-way on both sides of the park, and had planned to let a construction contract for a section immediately adjacent to the park this fall. The city and State have come to an agreement on the purchase of the parkland, and specific allocation of the proceeds for purchase of new parklands already has been made by the city. Of the \$2.2 million to be paid, \$1.0 million is committed to a 160-acre single new park, \$1.0 million is ear-

marked for several separate park tracts aggregating 140 acres, and \$0.2 million will be spent for zoo improvements in Overton Park itself. In essence, 26 acres of Overton Park is being replaced by about 300 acres of new Memphis parks.

Until a decision is reached in the Office of the Secretary regarding the design of I-40 through Overton Park, further negotiations with the city, as well as further advancement of all projects within the seven-mile gap, is being held in abeyance.

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[EXHIBIT E]

STATE OF TENNESSEE  
DEPARTMENT OF HIGHWAYS  
Nashville 37219

September 3, 1969

Contract No. 0014  
Project I-40-1(90)3  
I-40 from McLean to Maris  
Shelby County

Mr. John S. Logan, Jr.  
Bureau of Public Roads  
Nashville, Tennessee

Dear Mr. Logan:

We are enclosing herewith three copies of a letter, dated September 2, 1969, from Mr. L. W. Keeler to the writer, and three copies each of the two letters referred to by Mr. Keeler. All of this correspondence has to do with the statements made by individuals during the period of the missing tape record of the design public hearing.

You will note that Mr. Keeler states that the Department has reviewed the supplemental information received in connection with the missing portion of the tape, and that no



changes are recommended in the proposed design. Please make this letter and the attached correspondence a supplement to the Design Study Report.

It is hoped that with this submission you will be able to furnish the Department at a very early date your approval of the proposed design for the project.

Yours very truly,

/s/ Robert C. Odle  
Design Engineer

RCO:eb

Encl.

cc: Mr. H. D. Long  
Mr. L. W. Keeler

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STATE OF TENNESSEE  
DEPARTMENT OF HIGHWAYS  
Nashville 37219

September 2, 1969

Mr. R. C. Odle  
Design Engineer  
Department of Highways  
Nashville, Tennessee

Dear Mr. Odle:

Subject: Project I-40-1 (90)3, Shelby County - Section  
Through Overton Park, Design Public Hearing

Reference is made to my letter to you, dated June 5, 1969, in which I commented on the design public hearing for the subject highway and concluded that the comments in the hearing had not raised any issues which merited any change in the proposed design. As you know, the public hearing transcript failed to record statements of certain persons in attendance at the meeting. Our Department Attorney has followed up in accordance with discussions

with the Bureau of Public Roads to provide an opportunity for statements in the record by any persons attending the design public hearing, and who made statements which were not recorded in the transcript. I am enclosing herewith copies of 2 letters as follows: Dated July 22, 1969, from Mr. Forrest V. Durand; and August 29, 1969, from Mr. Henry K. Buckner, Jr., to Mr. John S. Logan, Jr. Mr. Buckner's letter states that, although he had given opportunity to Mrs. Watkins Overton for a written statement, none had been offered. Mr. Buckner further advised that these two letters provide the final public hearing public comments to be made a part of the public hearing record.

This supplemental information has been reviewed and it is not considered that any changes from our proposed design should be made, as no new information was presented and no recommendations made which are considered meritorious. It is hoped that with this submission the Bureau of Public Roads can now provide formal approval of our proposed design.

Yours sincerely,

/s/ L. W. Keeler  
Development Engineer

LWK:hf

Enclosures

cc: Com. C. W. Speight; Mr. H. D. Long;  
Mr. C. S. Harmon; Mr. Henry K. Buckner,  
Jr.; Mr. E. R. Terrell; Mr. J. K. Bilbrey

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August 29, 1969

Mr. John S. Logan, Jr.  
Bureau of Public Roads  
226 Capitol Boulevard Building  
Nashville, Tennessee 37219

Dear Mr. Logan:

Re: Shelby County  
I-40-1(90)3, 79002-2109-44  
McLean & Collins Street

This is to certify that Mrs. Watkins Overton, one of the participants whose statements was not recorded during the public hearing conducted on May 19, 1969, with respect to captioned matter, has through silence declined our offer to provide a written statement which reflects her views concerning this matter in accordance with the directive of Mr. Swick.

There are no other persons eligible to provide the written statement set forth in Mr. Swick's directive.

Very truly yours,

/s/ Henry K. Buckner, Jr.  
Department Attorney

HKBj:amh

Bc: Mr. L. W. Keeler

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BUREAU OF OUTDOOR RECREATION  
SOUTHEAST REGIONAL OFFICE

810 New Walton Building  
Atlanta, Georgia 30303

July 22, 1969

Mr. Charles W. Speight  
Commissioner  
Department of Highways  
State of Tennessee  
Nashville, Tennessee 37219

Dear Mr. Speight:

Mr. Charles E. Elkins, Jr., in his July 16, 1969 letter concerning Project No. I-40-1 (90)3, Shelby County, Design Public Hearing, stated that approximately one hour of the hearing's tape record was lost. He invited me to reduce the statement which I made to writing and submit it to him.

The statement I made was entirely from notes. While I cannot give a verbatim record, essentially what I said was as follows:

1. Regardless of what type of surface design is followed there won't be much in the way of a wooded park left in Overton Park after an interstate highway is routed through it.
2. Every possible consideration is recommended for a tunnel design which will leave the Park's surface wooded landscape undisturbed.
3. Consideration should be given to eliminating an access route to I-40 indicated by one of the maps displayed as being in the northwest wooded area of the Park.
4. Some mention was made by persons speaking at the hearing of conflicts between planned highways and other Memphis public park areas. I pointed out that the Secretary of the Interior had the responsibility

and prerogative of commenting on such possible conflicts where Federal funds were involved.

Sincerely yours,

/s/ Forrest V. Durand  
Assistant Regional Director

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August 6, 1969

Mr. John S. Logan, Jr.  
Bureau of Public Roads  
226 Capitol Blvd. Bldg.  
Nashville, Tennessee 37219

Dear Mr. Logan:

Reference is made to my letter of July 31, 1969 concerning the public hearing on Overton Park in Memphis, Tennessee.

Today I have received the enclosed letter from Dr. Arlo I. Smith, Chairman, Citizens to Preserve Overton Park. Although Dr. Smith's letter was not mailed within the 10-day period I feel that due to the circumstances involved it should also be made a part of the public hearing, so I hereby submit it to you.

Yours very truly,

/s/ Clarence E. Elkins, Jr.  
Staff Attorney

CEE:al  
Enclosure

## OVERTON PARK ROUTING OF INTERSTATE 40.

In Compliance with opportunity to reduce oral testimony not recorded in the last hour of the Public Hearing in City Hall.

Statement of Arlo I. Smith, Chairman  
Citizens To Preserve Overton Park,  
who spoke briefly at the close  
of the hearing testimony

In addition to re-emphasizing the *summary* which was given at the close of the main presentation of the Citizens To Preserve Overton Park—main presentation by Mrs. Stoner; the summary by Dr. Arlo I. Smith (see statement following page 11 of written testimony)—the following requests were made:

1. Data on alternate routes considered before the park location was chosen—
  - a) dates the routes were studied and rejected
  - b) report on reason for rejecting the alternates
2. Who were the people consulted *outside* the field of engineering when Overton Park was being considered as a location for I-40?
  - b) What authorities from other fields were consulted? Such as, conservationists, demographers, ecologists, educators, health authorities, park and recreation leaders, sociologists?
  - c) Was the Tennessee State Conservation Department and the Tennessee Naturalist consulted?  
Was the Tennessee Commission on Wildlife consulted?  
Was the Tennessee Commission on Historic Preservation consulted?
  - d) Was the U.S. Department of the Interior consulted; if so, who in the Department and the date?

Answers to these questions are asked within ten days (10) of May 19, 1969, answers to be sent to Citizens To Preserve Overton Park, Memphis, Tennessee.

/s/ Arlo I. Smith  
Chairman

August 2, 1969

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August 1, 1969

Mr. John S. Logan, Jr.  
Bureau of Public Roads  
226 Capitol Blvd. Bldg.  
Nashville, Tennessee 37219

Dear Mr. Logan:

Reference is made to my letter of July 31, 1969 concerning the public hearing on Overton Park in Memphis, Tennessee.

Today I have received the enclosed letter from Mr. Harry W. Rice, Assistant Director, U.S. Department of the Interior, Bureau of Outdoor Recreation. Although Mr. Rice's letter was not mailed within the 10-day period I feel that due to the circumstances involved it should also be made a part of the public hearing, so I hereby submit it to you.

Yours very truly,

/s/ Clarence E. Elkins, Jr.  
Staff Attorney

CEE:al  
Enclosure

U.S. DEPARTMENT OF THE INTERIOR  
BUREAU OF OUTDOOR RECREATION  
Washington, D.C. 20240

July 28, 1969

Mr. Clarence E. Elkins, Jr.  
Staff Attorney  
Department of Highways  
State of Tennessee  
Nashville, Tennessee 37219

Dear Mr. Elkins:

I appreciate receiving your letter of July 16, providing me an opportunity to submit a resume of my comments made on May 19, in Memphis, regarding the proposed expressway through Overton Park.

I do not recall all of my specific comments, but I do recall that I had expressed concern over the proposed design of the expressway, which would impair the usefulness of the park by separating it into two parts. I pointed out that throughout the Country needs are increasing for more park and recreation areas to meet mounting population increases and that Memphis has a special asset in Overton Park because of its size and location within the city limits. I also urged that the Department of Highways not let cost be the sole criterion in developing designs for this expressway. Once the park has been separated by the expressway its values have been seriously impaired; whereas, a tunnel or a depressed expressway with appropriate cover would allow the park to be used to its greatest extent. I hope that serious consideration will be given to depressing this roadway fully with appropriate lids or that it may be possible to route the expressway through a tunnel.

There seems to be an increase in the number of park-highway conflicts throughout the Nation, and I expressed the view that I would hope the engineers for the Department of Highways of the State of Tennessee could develop a



facility that other parts of the Country could refer to as a model.

Sincerely yours,

/s/ Harry W. Rice  
Assistant Director

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July 31, 1969

Mr. John S. Logan, Jr.  
Bureau of Public Roads  
226 Capitol Blvd. Bldg.  
Nashville, Tennessee 37219

Re: Project No. I-40-1 (90)3  
Shelby County, Tennessee  
Public Hearing

Dear Mr. Logan:

Reference is made to your letter of July 11, 1969 to Comm. Speight concerning that part of the transcript of the above captioned public hearing which was defective.

Please find enclosed a Certification as requested by your letter. I hope that this is satisfactory.

Very truly yours,

/s/ Clarence E. Elkins, Jr.  
Staff Attorney

CEE:al

Enclosures

cc: Comm. C. W. Speight  
Mr. H. D. Long  
Mr. L. W. Keeler

CERTIFICATION TO SECRETARY  
DEPARTMENT OF TRANSPORTATION

In Accordance with Section 128, Title 23,  
United States Code Annotated

This is to certify that in accordance with the letter of Mr. John S. Logan, Jr., Division Engineer, of July 11, 1969 concerning Project No. I-40-1(90)3, Design Public Hearing, Shelby County, Tennessee. I have notified in writing all persons whose statements were not recorded during the hearing and have given them the opportunity to reduce their statements to writing within a 10-day period. Those people so notified were: Mrs. William Dupree, Mrs. Anona Stoner, Dr. Arlo I. Smith, Mr. Forrest Duvant and Mr. Harry Rice.

I hereby certify that the 10-day period has passed and the enclosed is the only statement that I have received.

/s/ Clarence E. Elkins, Jr.  
Staff Attorney

July 31, 1969

cc: Mr. L. W. Keeler

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## [EXHIBIT F]

## NATIONAL RECREATION AND PARK ASSOCIATION

May 22, 1969

The Honorable James D. Braman  
Assistant Secretary  
Urban Systems and Environment  
Department of Transportation  
800 Independence Avenue, S.W.  
Washington, D.C.

Dear Mr. Braman:

Enclosed is a copy of the statement by Mr. Thompson for the National Recreation and Park Association at the Design hearing on I-40, Overton Park section, at Memphis, Tennessee, Monday, May 19. We commend the Tennessee State Highway Department for the manner in which the hearing was conducted. Mr. Buckner, the presiding officer, was patient, fair and responsive. It was a good hearing and all who attended it received useful information.

Residents of Memphis who urged greater protection of the Park, strongly recommended that the highway be placed under the Park in a tunnel. We agree that that would be the best possible way to design the freeway, if it must cross Overton Park.

We are still greatly concerned about the inadequacy of the highway design which was presented by the State at the Monday hearing.

The design presented would depress the highway 10 feet or more below the ground level for some 1800 feet through the eastern portion of Overton Park. Westerly, for the next 2300 feet to the western edge of the Park, the highway would be depressed varying amounts but less than 10 feet below ground surface and, in the vicinity of Lick Creek and for several hundred feet each side of the Creek, the highway would be on a fill ranging from ground surface to as

much as 6 feet above ground. Truck traffic would obviously be visible through this 2300-foot western portion of the Park.

While we do not profess to be engineers, we are still of the opinion that not enough consideration has been given to the possibilities of (a) carrying Lick Creek over I-40 in an aqueduct, or (b) depressing Lick Creek under I-40 in an inverted siphon, or (c) diverting Lick Creek westward almost to the McClean Street edge of the Park where ground surface is somewhat higher than it is at the present location of Lick Creek, which would give a little more leeway for depressing the Creek under the highway, then conducting it northward to a junction with its present course north of the Park.

From the park protection point of view, the advantage of any one of the three suggested alternatives would be to make possible the depression of the highway sufficiently throughout the Park section to keep truck traffic out of sight.

Mr. R. G. James, Geometric Design Engineer of the Bureau of Public Roads, in his report of April 29, 1968 was concerned about possible difficulties that might be encountered from ground water if the highway profile was depressed more than indicated in his alternate profile suggestions. Later test drillings, however, indicated that the ground water level was some 11 feet lower than he had assumed it to be. That should permit depressing the highway further than he suggested and further than the profile shown at the May 19 hearing.

The other factor that still concerns us very much is that there was no apparent inclination on the part of the highway officials to reduce the width of the highway right-of-way through the Park. The plan presented at the hearing still shows a 40 foot median strip and broad sloping areas on both sides of the highway for grass and other landscaping. In brief, the plan presented still shows the high-

way right-of-way through the Park as 425 feet wide at the eastern edge of the Park, 250 wide near the Park overpass and some 200 feet wide at Lick Creek. This will obliterate an enormous swath of superb oak-hickory forest through much of the Park.

I write to you to urge the Department of Transportation to require more serious exploration of the alternative possibilities of (a) depressing the freeway sufficiently throughout its entire crossing of the Park and (b) that the right-of-way be narrowed to the minimum required for highway safety.

Sincerely,

/s/ Sal J. Prezioso  
President

SJP:BHT

Enclosure

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MEMPHIS, TENNESSEE, May 19, 1969

I am Ben H. Thompson, legislative assistant on the staff of the National Recreation and Park Association. I am here to represent Dr. Sal J. Prezioso, President, National Recreation and Park Association with headquarters at 1700 Pennsylvania Avenue, N.W., Washington, D.C. The Association is a private, nonprofit educational and service organization dedicated to the wise use of free time, conservation of natural resources, and beautification of the American environment.

It is our understanding that the purpose of this hearing is to consider the design of the projected highway. The corridor or route of the highway, cutting across Overton Park, has already been approved by the Department of Transportation.

It is the view of the National Recreation and Park Association that routing Interstate 40 through the Park, with six

traffic lanes designed for speeds up to 60 miles an hour, is a tragic mistake. The sound, sight, and fumes of motor traffic, including trucks and buses, will impinge upon the present character of this quiet midcity park in a very damaging manner. We have opposed routing the highway across the Park and we still oppose it. We are opposed to all such needless and heavy handed encroachments upon irreplaceable park lands.

Since the Department of Transportation made its decision on the park route, our efforts have been aimed at doing everything possible to persuade highway officials to design the highway through the park in such a manner as to minimize its damaging impact on park values.

The gist of our repeated recommendations has been that (1) the highway should be depressed sufficiently to eliminate the sight of fast moving traffic through the Park, reduce the sound, reduce the height and length of the park road overpass connecting the severed parts of the Park, reduce the height of the pedestrian overpass to the zoo and that (2) the highway right-of-way through the Park should be narrowed to the minimum consistent with traffic safety, making it possible thereby to keep as needed park land half or nearly half of the presently proposed 250-foot wide highway right-of-way.

We realize that the City, State, and Federal highway agencies have made studies of alternate highway profiles through the Park, considering different depths of depression of the highway below the park land surface. The lowest control point in each of the alternative road profiles studied is determined by the theoretical 50-year flood elevation of Lick Creek, which is estimated to be at ground level elevation 251 feet above sea level.

The highway profile which we understand that the City, State and Federal highway agencies find acceptable, would depress the highway 10 feet or more below the ground level for some 1800 feet through the eastern portion of Overton Park. Westerly, for the next 2300 feet to the western edge of the park, the highway would be depressed varying amounts but less than 10 feet below ground surface and, in the vicinity of Lick Creek and for several hundred feet

each side of the Creek, the highway would be on a fill ranging from ground surface to as much as 6 feet above ground. Truck traffic would obviously be visible through this 2300-foot western portion of the park.

[Illegible] the several highway profiles studied, Alternate Profile Number 2 would do less damage to park values, because it would, for the most part, be depressed several feet below the line which the highway agencies find most acceptable.

Alternate Profile Number 2 involves shallower and wider box culverts to conduct Lick Creek under the highway and assumes downstream improvements recommended for Lick Creek. The highway profile where it crosses Lick Creek would be at elevation 252 feet above sea level which is about 2 feet above the ground surface at that point in the park.

Even that alternative, which has not been accepted by the highway agencies, would bring the traffic to the surface close to the zoo and close to heavy use areas of the Park. If there is no better alternative, then we would recommend approval of Alternate Profile Number 2.

If Lick Creek could be carried over the highway or if the Creek could be depressed sufficiently, the highway profile likewise could be depressed throughout the Park, keeping traffic out of sight from important use areas in the Park and reducing its damaging impact.

We do not know whether serious study has been given to either of these possibilities and their cost. If such study has not been made, we believe that it should be made in the immediate future. The study need not require prolonged or unreasonable delay.

Assuming that it is feasible from the engineering angle to carry Lick Creek over the highway or to depress the Creek under the highway, the question of costs immediately arises. Lacking the results of such a study, we do not have that information.

[Illegible] the damaging impact of a major highway invasion of the Park must be evaluated in relation to the social

and cultural value that the Park in its particular location offers to the people of Memphis. Such values are timeless and cannot be adequately expressed in dollars and cents; they cannot be expressed in terms of the dollars it would take to buy an equal amount of land some place else. The ~~great~~ value of a midcity park, such as Overton, is in its character and its location. If its values are gradually dissipated by repeated encroachments its social and cultural utility will be reduced and impaired for all time. Even if it should cost up to several million dollars more to reduce significantly the damaging impact of I-40 on Overton Park, we would hold that such additional cost is good and sound investment in the protection and preservation of the timeless values of the Park and in the enduring character of Memphis as a desirable place to live.

It is highly unlikely that 25 years from now anyone will be seriously concerned about the cost of ameliorating the damaging impact of the interstate highway on Overton Park. But the severing of the Park and the intrusion of noisy freeway truck, bus, and car traffic into the previously quiet atmosphere of the Park will be the reality that people using the Park will live with, night and day, for as long as the interstate highway is used.

Considering, now, the proposed right-of-way, land that is to be taken out of park use and devoted to freeway use, the proposed right-of-way is 425 feet wide at the east side of the Park; it is still 250 feet wide most of this distance, the highway will traverse and obliterate a wide swath of magnificent park forest. Every foot of park land that can be preserved by narrowing the highway right-of-way should be preserved.

The major consideration, we hold, in determining the width of the highway right-of-way through the Park, should be directly related to highway traffic safety. Cutting down old park forest trees merely to provide space for freeway landscaping is, in our opinion, highly questionable. The whole Park was set aside for its landscape, scenic and other cultural values. If the freeway must go through it, it should do so as unobtrusively as possible. We should not destroy



park values to try to make the freeway invasion look more attractive.

If, for instance, a 22-foot median strip with a 2-foot thick stone barrier in its center is necessary for highway safety, then let it be provided for safety but let us not widen the median to 40 feet through the Park for highway esthetics.

Summarizing, we strongly urge that the highway through the park be depressed sufficiently to keep truck traffic below ground surface and that the proposed right-of-way be narrowed to the minimum required for traffic safety.

In making these recommendations to minimize freeway damage to Overton Park, we want to emphasize that our recommendations are for that specific purpose.

We are in sympathy with the vision, imagination and idealism of highway officials who want to make the nation's highways as attractive and pleasant as possible and to design them so that they not only reflect the cultural values of our country, but, wherever possible, enhance highway travelers' appreciation of those cultural values. We are all highway users as well as park users.

In improving the nation's highways, we do not need to invade our parks because public land is cheaper, or fewer structures will have to be acquired and demolished, or to make the highway more attractive by taking park land. Clear perception of the different values involved and services rendered by different agencies of the public and mutual respect for each other's efforts to provide these different but essential public services must guide our proposals, decisions and actions.

With the establishment of the Department of Transportation and with the clear recognition of the many social values involved in providing transportation facilities, as set forth in the "Protection of Parkland" provision and in section 4(f) of the Department's Organic Act and in the regulations governing highway location and design hearings, we believe that the people of the United States have entered into a new era in the conception, planning and construction of highway and other transportation facilities.

We believe that if Interstate 40 had been envisioned and planned from the beginning in the light of that new mandate from the Congress, we would not be here today holding a design hearing on that portion of the freeway slated to cut through Overton Park. The freeway would have been routed around the Park.

We hold that hope for future transportation projects under the new guidelines of Transportation's Organic Act and its evolving procedures and we want to help make it a reality.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**MOTION TO DISMISS**

Defendant through his attorney, the United States Attorney for the District of Columbia, respectfully moves the Court to dismiss the above entitled cause for failure to state a claim over which this Court has jurisdiction or upon which it may grant relief. Incorporated in and made a part of this motion is the affidavit of Edgar H. Swick, Deputy Director of the Bureau of Public Roads, with attachments (Defendant's Exhibit A), and copies of transcripts of hearings held in Memphis, Tennessee, in 1969 and 1961 on this matter (Defendant's Exhibit B).

/s/ Thomas A. Flannery  
United States Attorney

/s/ Joseph M. Hannon  
Assistant United States Attorney

/s/ Ellen Lee Park  
Assistant United States Attorney

[Certificate of Service omitted in printing]

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**AFFIDAVIT**

City of Washington  
District of Columbia

I, JOHN W. VARDAMAN, JR., after being duly sworn, do hereby depose and say:

1. The document attached hereto as Exhibit A is "A Report Upon ALTERNATE LOCATION STUDIES-FAI 505, Memphis and Shelby County, Tennessee, prepared for STATE OF TENNESSEE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS, NASHVILLE, TENNESSEE, Prepared by HARLAND BARTHOLOMEW AND ASSOCIATES and CLARK, DAILY AND DIETZ, June, 1958."

2. The document attached hereto as Exhibit B is a copy of that part of Mr. Lowell K. Bridwell's testimony before the Subcommittee on Roads of the Senate Committee on Public Works, 90th Cong. 1st and 2nd Sess., May 28, which concerns the Overton Park dispute.

3. Attached as Exhibit C is a copy of a letter dated August 23, 1965, to Mr. Rex M. Whitton, Federal Highway Administrator, from Mr. David M. Pack, Commissioner, Tennessee Department of Highways. This document was produced for me by representatives of the Bureau of Public Roads.

4. Attached hereto as Exhibit D is a letter dated September 2, 1965, to Mr. John C. Cobb, Division Engineer, Bureau of Public Roads, from Mr. L. W. Keeler, Development Engineer, Tennessee Department of Highways. This document was produced for me by representatives of the Bureau of Public Roads.

5. Attached hereto as Exhibit E is a map provided to me by representatives of the Bureau of Public Roads which

shows alternatives A and B and of the proposed route through Overton Park.

/s/ John W. Vardaman, Jr.

January 5, 1970

Subscribed and sworn to  
before me this 5th day  
of January, 1970.

/s/ Louise Norris  
Notary Public, D.C.  
My commission expires  
Dec. 14, 1970.

*Exhibit B*

63

# URBAN HIGHWAYS

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HEARINGS  
BEFORE THE  
SUBCOMMITTEE ON ROADS  
OF THE  
COMMITTEE ON PUBLIC WORKS  
UNITED STATES SENATE  
NINETIETH CONGRESS  
FIRST AND SECOND SESSIONS  
ON  
Urban Highway Planning, Location, and Design

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PART 2

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MAY 1, 6, 7, 8, 27, AND 28, 1968

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Printed for the use of the Committee on Public Works



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1968

Senator SPONG. Before you go with that, Mr. Bridwell, may I ask if any design concept team at all has been employed in New Orleans?

Mr. BRIDWELL. Not a design concept team as such, Mr. Chairman. What has been done in New Orleans is to bring the city planning department very strongly into the design concept stage rather than hiring outside consultants.

New Orleans is fortunate in having a very fine city planning department headed by Steuart Brehm, who to our way of thinking has demonstrated considerable sympathy for the concept of jointly using space for highways and other community improvements.

If it is agreeable with you I will take a couple of more minutes on New Orleans because this happens to be an extremely important problem and a very interesting one.

Senator SPONG. I wish you would.

Mr. BRIDWELL. It raises such questions as this. Let's assume that we can build a highway along the riverfront that reasonably meets criteria of not being a disruptive force for the French Quarter. Then we also should ask the question is the city of New Orleans doing everything that it can to preserve and enhance this very historic section of the city.

Is it, for example, maintaining and preserving the buildings in the French Quarter. Is it appropriate to the preservation and enhancement of the French Quarter to build motor hotels in it.

Senator SPONG. They built several.

Mr. BRIDWELL. Yes, sir, there are several built, and another one under construction; and a new one just recently announced. If a high-quality highway facility can be built on the riverfront, then would the city of New Orleans entertain the idea of blocking off the narrow congested French Quarter streets for through traffic, forcing the vehicles on to the freeway and thereby eliminating, or certainly substantially reducing the congestion of both traffic and parking in the French Quarter?

Additionally, if the city—and I agree with this so it is not an argument—places a very high value upon the potential for redevelopment of the riverfront then I would ask the question can it tolerate or alternatively what does it intend to do about such structures as are illustrated in exhibit 2? There we see many old warehouses and similar type buildings of a relatively low economic land use, certainly not anything close to the type of land use that has been provided by the construction of a new trade mart and the convention center immediately upstream from Canal Streets. I think the question of highway planning has to be taken in context of what other activities, either public or private, activities in the sense of either policies or programs, are also being undertaken to preserve and to enhance this historical section of the city because certainly its preservation and its enhancement is a policy with which we would agree.

Let me go on to Memphis, if I may, because it presents essentially the same kind of a basic conflict in community social values but in a little bit different context.

In Memphis, again a very significant controversy, and you will not be able to see this well so I will illustrate in figure 9. Between two



FIGURE 9

points bounded by yellow lines near the center of the photograph is a section called Overton Park. It is a municipality owned park, a very beautiful park, highly developed, one in which the city obviously takes considerable pride.

Memphis has provided substantial investment in the form of museums, a zoo, golf course, picnic facilities, and other facilities which make it an extremely attractive and highly used park.

There have been plans for many years to build an interstate highway, interstate Route 40, through the park. This culminated recently in considerable controversy over whether the park could or should be used for an interstate highway. Once again this 4(f) portion of the Department of Transportation Act came into play.

It, in effect, required us to do the same type of thing that we did in New Orleans, go back and look at, is there another feasible and prudent location.

Again experimenting we handled this one a little bit differently. We went to the city council of Memphis and we said, "Yes, there are alternatives. We won't even give you any information on what the alternatives cost in dollars because we don't want that to be a factor in your recommendation of which line to choose. Rather, we would like you to focus upon the conflicting set of community values that are inherent in this kind of a situation."

We told them that a highway could be built through the area on almost any conceivable line that they could pick, that engineeringly it was feasible, that we refused to give them any information as to cost, the primary reason being that Memphis was not involved in the cost of it one way or the other, but rather to concentrate upon the conflicting set of community values that were inherent in each one of the alternatives.

We said, for example, we could build the line which is purple on exhibit A and labeled alternative "b" and if we do this the following consequences will occur, and we told them about the number of houses that would have to be taken out, the number of businesses, the fact that it would traverse the Southwestern University campus, the fact that it would take out a national headquarters office of a private industry organization, that it would require the removal of a high school, and, as I have indicated a considerable number of residences.

We asked "Is that more important to you than the park or is the park more important than the removal of those houses—national headquarters—university—high school complex?"

Alternatively we could go out of the park on the blue line which is labeled alternative "a" on exhibit A and if we do this then the following consequences will result, and again we told them the number of houses, the number of businesses that would be affected, the fact that we would take out a Presbyterian cemetery, that it would go through the middle of a B'nai B'rith home for the aged. We asked, "Now which is more important to you as a community? Would you rather have the park or would you rather have these other things that would be disruptive?"

We went through this for approximately  $3\frac{1}{2}$  hours in which we left it completely in the hands of the city council to choose anything they wanted to choose, and after several days the city council voted to stick with the original line through the park.

Now, two or three things happened in the course of that activity. One is that no one was able to say that this community value, namely, the Southwestern campus, is worth  $x$  number of dollars and the trees in Overton Park are worth  $x$  number dollars because we don't have any method of assigning that kind of a quantifiable factor to any one of these things for labeling community values, so the elected representatives of the city reached their intuitive and subjective judgment, at any rate.

They said "These other things are more important to us as a community than the location through Overton Park."

Now, we still have before us the problems of how do you design this to minimize damage, and that isn't decided yet. The only thing that has been decided is that, yes, we will go through Overton Park, but the witnesses who have appeared in this set of hearings have been highly critical of the highway program for precisely this kind of a decision, or for the decision in New Orleans, or for any number of other decisions which have been made regarding location and design in urban areas. They have placed their own personal set of values or that the organization they represent, their organization's on this kind of a situation.

There is no nice, easy answer to this and there never will be. There won't be in an urban renewal program or one that I recently ran into involving expansion of a university complex.

Any time there is disruption to an established pattern in the urban environment there necessarily must be conflicting sets of values brought into play and someone has to make the decision about which set of values prevails. The Secretary testified yesterday that except for very unusual circumstances the decision of the local people would prevail, in the form of the action of the elected representatives, their mayor, their city council, their appropriate local officials.

We have one other project here that I want to talk about because it represents just a little bit different situation than either New Orleans or Memphis, but again we are constantly working with what can be called conflicting sets of community values.

In this particular instance this is Cambridge, Mass. Keep in mind that in both New Orleans and Memphis we were dealing with a prob-



## [EXHIBIT C]

STATE OF TENNESSEE  
DEPARTMENT OF HIGHWAYSHighway Building  
Nashville 37219

August 23, 1965

Mr. Rex M. Whitton  
Federal Highway Administrator  
U.S. Department of Commerce  
Washington, D.C. 20235

Dear Mr. Whitton:

Subject: Tennessee Project I-40-1 (68)3,  
Shelby County - Location Through  
Overton Park in Memphis

About a year ago, this Department reviewed the selected location for Interstate Route 40 through Memphis to determine whether or not some modification of a section of the route could reasonably be made which would avoid crossing Overton Park. Some of the citizens of Memphis had voiced opposition to the routing through the Park. We are highly appreciative of the great value of large park areas within large cities and realize that we are all obligated to avoid destruction of such areas where reasonably possible. However, we must carefully view all of the involved factors in this case with an ultimate objective of preservation of the best public interest. The facts are that total area of Overton Park is approximately 340 acres and our proposed highway would use only approximately 20 acres. Therefore, it cannot be said that reduction in Park area is extreme in proportion. We do, however, propose to minimize the area of actual taking of Park land and also to minimize the disruptive effect on Overton Park through careful attention to location and design details.

Our engineering staff made projections for two alternate routes which appeared to have possibilities for avoiding the

crossing of Overton Park. These are shown on Line "A" and Line "B," respectively, on a map of Memphis enclosed. Estimates of the costs of acquisition of rights-of-way and construction on each of these alternate lines were prepared and were compared with the costs estimated for a comparable section of the original route passing through Overton Park. Our estimates showed that the total costs for rights-of-way and construction for Lines "A" and "B" and the original routing were as follows:

Line "A" - R/W and Construction	\$26,289,000
Line "B" - R/W and Construction	\$31,325,000
Original Line - R/W and Construction	\$17,141,000

Thus it was determined that for the items of right-of-way acquisition and construction the original line through Overton Park had a cost advantage of more than \$9,000,000 as compared with the least costly of the two possible alternatives considered. It was obvious that it was strongly in the best public interest to continue with our selected routing through Overton Park. In further reviewing this situation at this time we have taken into consideration the comparative user benefits of the two alternate Lines "A" and "B" as compared with the line through Overton Park. We estimate a 1987 ADT of 80,000 and that Line "A" alternate would add approximately 3/10 mile to the travel distance and Line "B" would add approximately 15/100 mile as compared with the more direct line through Overton Park. Considering only the through Interstate traffic without considering interchange movements, it is noted that the annual user costs for the 3 lines being compared are as follows:

Line "A"	10,397,000
Line "B"	10,032,000
Original location through Overton Park	9,615,000

Thus it is seen that there is a substantial economic advantage in favor of our selected route through Overton Park in terms of users benefit. This annual savings to users in the amount of approximately \$780,000 would be reflected as an initial cost savings of \$8,970,000 as compared with Line "A" and an initial cost savings of \$4,780,000 as compared

with Line "B." Taking this element into consideration together with the comparative costs of right-of-way and construction would result in a total net economic advantage for the line through the Park in the amount of \$18,118,000 as compared with Line "B" and an advantage of \$18,964,000 as compared with Line "A."

In addition to the economic justification there are of course other important considerations which must be recognized in determination of a location in this case.

The route through Overton Park is favorable with respect to displacement of persons and destruction of property. We have made a survey and find that in this respect the original route compared with Lines "A" and "B" as shown in the following table:

*Line "A"*

Residential Units	771 = 3065 people
Commercial & Industrial	46 = 1300 people
Churches	3 = 75 (actually employed) 7,500 people affected
Schools	2 = 80 (actually employed) 2,000 people affected
Hospitals & Homes for Aged	1 = 200 people
Total	4720 people

*Line "B"*

Residential Units	428 = 1563 people
Commercial & Industrial	125 = 638 people
Churches	5 = 60 (actually employed) 4,000 people affected
Schools	3 = 125 (actually employed)
Total	2386 people

This route would cross the property of Southwestern University and would destroy valuable properties in the business area on Summer east of East Parkway.

*Original Line Through Overton Park*

Residential Units	412 =	2292 people
Commercial & Industrial	30 =	295 people
Churches	4 =	20 (actually employed) 5,600 affected
Schools	None =	0
Total		2607 people

On both Lines "A" and "B" there would be destruction of many fine homes and attendant damages to adjacent valuable properties. These costs are reflected in the estimates for cost of right-of-way.

The route through the Park would minimize disruption of the existing street layout and traffic patterns. Overton Park is a large area without street crossings and consequently the streets adjacent to the Park have been important multilane arterial highways. These are as follows: North Parkway - Summer on the north; East Parkway on the east; and Poplar Avenue on the south. Each of these is a thoroughfare of long continuity. Our proposed route through the Park will span East Parkway with a diamond type Interchange and will not cross either Poplar or North Parkway. Line "A" would result in crossing and recrossing of Poplar Avenue and require an interchange in the vicinity of the intersection of East Parkway with Poplar Avenue. This situation would not be desirable. Line "B" would cross and recross North Parkway - Summer Avenue, and would cross East Parkway near the intersection of North Parkway - Summer which would be undesirable with respect to interchanging.

The facts described above have convinced us that it is strongly in the best public interest to continue with our intention to construct the highway through Overton Park. We have, however, continued efforts to minimize the taking of Park land and to minimize any possible reduction in recreation and aesthetic values of the Park. We have studied the possibility of moving the interchange originally

planned at East Parkway to Hollywood in an effort to reduce taking of Park area. Our studies showed that it is not advisable to move the interchange from East Parkway to Hollywood for the reason that an interchange at Hollywood would not conform with the existing city street plan and could not provide for traffic needs without reconstruction.

In continuation of our efforts toward the objectives stated above, we have recently been able to achieve two developments which promise to reduce the impact of the highway location on the Park. One of these is that arrangements appear to be possible which can permit shifting of our location a short distance northerly to move somewhat out of a particular wooded recreation area of the Park and to follow the right-of-way of a former street car line which already severs the Park area. The old street car right-of-way is presently in use solely by the Memphis Transit Authority for travel by street buses which have replaced the former street cars. It is indicated that it will be possible to remove the street buses and utilize the street car right-of-way as part of the width of the Interstate Highway. The advantages are obvious.

The other development mentioned is that we have determined that a diamond type interchange at the crossing of East Parkway at the eastern edge of Overton Park can replace the interchange originally planned with a consequential reduction of taking of Park land for interchange ramps. Our Consultant Engineer, employed to design the project, has been instructed to proceed to develop plans in accordance with the location along the old car line and with the diamond type interchange at East Parkway.

The grade elevation through Overton Park will be designed so as to require a minimum width of Park land. The planning will allow for shielding from view and noise by appropriate roadside planting. We will provide adequate pedestrian overpasses with careful design to conform with the Park setting as far as possible. Adequate vehicular separation structures will be provided for the Park roads.

We hope that the information and discussion herein will reassure you that our Department was correct in selecting the route through Overton Park and that your Department was correct in approving our route selection. We regret that some of the citizens of Memphis have voiced opposition to our location. We are in sympathy with their high regard for the value of the Park and recognize their sincerity of purpose. However, it is thought that in our position of responsibility to consider all facts involved we are impelled to proceed as planned. We believe that when the project has been constructed, the public will quickly recognize the great contribution of the facility in solving a major traffic problem in Memphis and will see that Overton Park has been affected only to a minor extent.

Yours truly,

/s/ David M. Pack  
Commissioner

DMP:hf

Enclosure

cc: Mr. J. C. Cobb  
Staff

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**NOTICE OF DEPOSITION**

To: Joseph M. Hannon, Esq.  
Assistant United States Attorney  
United States Courthouse  
Washington, D.C. 20001

Please take notice that, pursuant to the Federal Rules of Civil Procedure, plaintiff Citizens to Preserve Overton Park, Inc., will take the deposition of Lowell K. Bridwell before a duly qualified notary public in Suite 900, Farragut Building, 900-17th Street, N.W., Washington, D.C., 20006, commencing at 4 o'clock p.m. on Friday, January 16, 1970. The deposition will continue from day to day until completed.

John W. Vardaman  
900-17th Street, N.W.  
Washington, D.C. 20006  
Tel. No.: 296-8800  
Counsel for Plaintiff  
Citizens to Preserve Overton  
Park, Inc.

Dated: January 9, 1970

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**MOTION FOR A PROTECTIVE ORDER**

Defendant through his attorney, the United States Attorney for the District of Columbia, respectfully moves the Court pursuant to Rule 30(b), Federal Rules of Civil Procedure, for a protective order providing that the deposition of Lowell K. Bridwell scheduled for January 16, 1970 not be taken pending disposition of the motion to dismiss scheduled to be heard January 23, 1970.

/s/ Thomas A. Flannery  
United States Attorney

/s/ Joseph M. Hannon  
Assistant United States  
Attorney

/s/ Ellen Lee Park  
Assistant United States  
Attorney

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**ORDER**

Upon consideration of defendant's motion for a protective order and plaintiffs' response thereto, and it appearing that during oral argument of said motion counsel for plaintiffs agreed to withdraw the notice of taking the deposition of Lowell K. Bridwell on January 16, 1970, it is by the Court this 23rd day of January, 1970

ORDERED that defendant's motion for a protective order be granted and that the deposition of Lowell K. Bridwell shall not be taken pending disposition of defendant's motion to dismiss.

/s/ William B. Jones  
United States District Judge



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**MOTION TO DISMISS AMENDED COMPLAINT**

Defendant through his attorney, the United States Attorney for the District of Columbia, respectfully moves the Court to dismiss the complaint as amended. Incorporated in and made a part of this motion is the affidavit of Edward H. Swick, Deputy Director of the Bureau of Public Roads, with attachments (Defendant's Exhibit A), and copies of transcript of hearings held in Memphis, Tennessee, in 1969 and 1961 on this matter. (Defendant's Exhibit B.)

/s/ Thomas A. Flannery  
United States Attorney

/s/ Joseph M. Hannon  
Assistant United States  
Attorney

/s/ Ellen Lee Park  
Assistant United States  
Attorney

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**AFFIDAVIT**

I Billy Brink after being duly sworn do hereby depose and say:

1. I am an engineer in the General Engineering Division of the Bureau of Reclamation, Department of the Interior. In my capacity as an engineer I am familiar with the engineering and design of a number of projects which include the use of an inverted siphon. Those projects include:

a. New River Siphon on the All American Canal System—Boulder Canyon Project.

b. Big Thompson River Siphon—Colorado Big Thompson Project.

c. Bacon Siphon and the Wahloke Siphon on Columbia Basin Project.

2. Basically an inverted siphon is an underground conduit with suitable inlet and outlet structures somewhat resembling a culvert through which water is conveyed by natural siphonic action. The use of an inverted siphon is a well-accepted engineering technique which I believe to be in common use throughout the United States.

3. In any situation where an inverted siphon is used, it will require some maintenance. This generally includes keeping the siphon clear of debris by use of trashracks, insuring that the stagnant water does not become a health hazard and providing suitable barriers to insure that it is not a hazard to children. However, with proper design and consideration given to these factors, there should be no undue difficulty in overcoming these maintenance problems.

/s/ Billy J. Brink

[Subscription omitted in printing]

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**AFFIDAVIT OF B. M. DORNBLATT**

City of New Orleans

Parish of Orleans: ss

I, B.M. Dornblatt, after being duly sworn, do depose and say:

1. I am a Civil Engineer with the firm of B.M. Dornblatt and Associates, Inc. I have had experience in designing free-ways in New Orleans and in other areas of this State and highways elsewhere in the United States.

2. On a number of occasions my firm has designed free-ways and highways portions of which have no natural gravity drainage. The problem of a lack of natural gravity drainage occurs because that portion of the highway is at or below natural drainage lands. In many instances, this arises in the

case of freeways which are depressed below grade. It is not unusual to design a section of a freeway so that it is depressed below the point where natural gravity drainage is available. My firm has designed the following portions of freeways which, because they were depressed, had no natural gravity drainage, for example, the tunnel on I-310 under the Rivergate Exhibit Facility at the foot of Canal Street in New Orleans, and an underpass on which is now I-10 at Black Bridge in New Orleans, together with underpass at Carrollton Avenue and City Park Avenue in New Orleans. I know of the following proposed freeways which I understand have no natural gravity drainage because of their depressed design: the St. Louis Riverfront Expressway and Philadelphia's "Delaware" Expressway in which pumping facilities are utilized for drainage.

3. In developing the design for situations where there is no natural gravity drainage, we have used pumping stations to drain any accumulated water or rainfall from the freeways. The use of pumping mechanisms in such situations is a well accepted engineering technique which I am sure is in common use throughout the United States. As a general matter, properly designed drainage and pumping facilities could overcome any problem of lack of natural gravity drainage for a depressed freeway.

4. In any situation where pumps are used to drain rainfall from a freeway, there is a potential problem of power failure for these pumps. This problem is generally overcome by auxiliary power sources as standby generators and dual sources of power with switching gear to automatically transfer from one circuit to the other should either fail.

5. The I-310 tunnel was constructed below the natural water table and the Carrollton Avenue Underpass was constructed in what was once a canal. While costs are somewhat increased due to need for external waterproofing and possibly to take care of uplift—this factor poses no engineering or construction problems.

/s/ B. M. Dornblatt

[Subscription omitted in printing]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**AFFIDAVIT**

City of Washington     )  
District of Columbia    ) ss:

I, Robert M. Kennan, Jr., being first duly sworn, do depose and say:

1. I am Chairman of the Roads Subcommittee and a member of the Board of Trustees of The Committee of 100 of the Federal City, a civic planning organization founded in 1923. In that capacity and as a matter of public interest I have followed closely all proposals, actions and developments relating to the Interstate Highway System in the District of Columbia for the past several years. I am generally familiar with the locations and proposed locations and designs and proposed designs of the various elements of that System including the:

- (1) Potomac River Freeway, I-266 (Sections B2-B4);
- (2) Center Leg of the Inner Loop, I-95 (Sections C1-C4), terminating at New York Avenue; and
- (3) South Leg of the Inner Loop, I-695 (Sections B1-B6).

The proposed designs for each of these segments of the Interstate System involve one or more tunnels. The proposed six-lane Potomac River Freeway will extend from the proposed Three Sisters Bridge across the Potomac River approximately three-quarters of a mile west of Key Bridge to the vicinity of 31st and K Streets, N.W. According to the design proposals for the Potomac River Freeway, the three westbound lanes will, at a point west of Key Bridge, proceed in a tunnel under the C&O Canal to an alignment between the present Canal Road and Georgetown University. The three eastbound lanes will be in a tunnel under the Georgetown waterfront and the C&O Canal for approximately one-half mile from a point between the present Canal Road and Georgetown University to 31st Street, N.W.

The eight-lane Center Leg of the Inner Loop (now partially completed) will extend from an interchange in the vicinity of South Capitol Street and Virginia Avenue, S.W. to New York Avenue between Second and Third Streets, N.W. The design proposals for the Center Leg provide for an eight-lane tunnel approximately one-half mile in length from the vicinity of the intersection of Canal and D Streets, S.W., under the Mall in front of the Capitol, to Constitution Avenue between Second and Third Streets, N.W.

The proposed six-lane South Leg of the Inner Loop will extend from a point northwest of the Lincoln Memorial in West Potomac Park to the completed Southwest Freeway in the vicinity of 12th Street and Maine Avenue, S.W. The proposed designs for the South Leg provide for a six-lane tunnel approximately 1.2 miles long from a point northwest of the Lincoln Memorial, under the Mall and the Tidal Basin, to 14th Street, S.W.

/s/ Robert M. Kennan, Jr.

[Subscription omitted in printing]

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**AFFIDAVIT**

I, John W. Vardaman, Jr., after being duly sworn, do depose and say:

The following statistics are based on public information available in Bureau of Public Roads Forms PR-511, entitled Status of Development of the National System of Interstate and Defense Highways.

**Six Lane Highway Projects in Downtown Areas  
Completed between 1966 - 1969**

**1. New Orleans, Louisiana**

**Rt. 3**

**Contract Number: 10-3-(29)-154-C and others**

**Cost: \$42,527,408**

**Average cost per mile: \$21,263,704**

**Length: 2.0 miles**

2. Washington, D.C.  
Rt. 295  
Contract Number: I-295-2-(22)-4-R and others  
Cost: \$9,576,522  
Average Cost per mile: \$7,980,435  
Length: 1.2 miles
3. Providence, Rhode Island  
Rt. 95  
Contract Number: I-95-3-(6)-37-R and others  
Cost: \$54,966,392  
Average Cost per mile: \$8,328,212  
Length: 6.6 miles
4. West Palm Beach, Florida  
Rt. 75  
Contract Number: I-75-1-(17)-0-EC and others  
Cost: \$19,621,230  
Average Cost per mile: \$6,131,613  
Length: 3.2 miles
5. New Orleans, Louisiana  
Rt. 10  
Contract Number: I-10-5-(2)-224-E and others  
Cost: \$28,724,039  
Average Cost per mile: \$11,968,349  
Length: 2.4 miles

/s/ John W. Vardaman, Jr.

[Subscription omitted in printing]

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

**ORDER**

This cause having been set for hearing on defendant's motion to dismiss and plaintiffs' motion for a preliminary injunction and during oral argument plaintiffs having moved to transfer this cause to the United States District Court for the Western District of Tennessee, and defendant having no objection to said transfer, and it appearing that defendant

is willing to waive the venue provision of 28 U.S.C. 1391(e) should plaintiffs join State and local officials in Tennessee as parties and defendant having agreed not to concur in the award for any contracts for this project within Overton Park prior to March 1, 1970, it is by the Court this 23rd day of January, 1970, without ruling on defendant's motion to dismiss or plaintiffs' motion for a preliminary injunction,

ORDERED that plaintiffs' motion to transfer the above entitled cause to the United States District Court for the Western District of Tennessee be and it hereby is granted, and the Clerk of this Court is directed to transfer this cause forthwith upon the entry of this order to the United States District Court for the Western District of Tennessee.

/s/ William B. Jones  
United States District Judge

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE

[Caption omitted in printing]

**AMENDED COMPLAINT FOR DECLARATORY  
JUDGMENT AND INJUNCTION**

Plaintiffs, for their complaint against defendants herein, allege as follows:

*Nature of the Action,  
Jurisdiction and Venue*

1. This action for a declaratory judgment, injunction, and for such other and further relief as may be deemed necessary arises under the Constitution and laws of the United States, namely the Fifth and Fourteenth Amendments to the United States Constitution; 28 U.S.C. §§ 128, 138, 102; and 49 U.S.C. § 1653(f). There exists between the parties an actual controversy, justiciable in character. The matter in controversy exceeds the sum of \$10,000, exclusive of interest and costs. This Court has jurisdiction under 5 U.S.C. §§ 701-706; 28 U.S.C. §§ 1331(a), 1332, 1361 and 2201-02. The defendant Volpe is an officer of the United States and committed the acts alleged herein in his official

capacity and under color of legal authority. The defendant Speight has headquarters in, and resides in, the State of Tennessee. The cause of action arose in Memphis, Tennessee and venue lies in the Western District of Tennessee under 28 U.S.C. § 1391(b).

### *Plaintiffs*

2. Citizens to Preserve Overton Park is a Tennessee corporation which has its principal place of activity in Memphis, Tennessee. It was organized for the purpose of preserving, protecting and enhancing Overton Park as a park land and recreation area. Its organizers and members are residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active since 1964 in efforts to preserve and protect Overton Park as a park land and recreation area.

3. Mr. William W. Deupree is the owner of property located at 1730 Glenwood Place, Memphis, Tennessee. He is a taxpayer of the City of Memphis, the State of Tennessee and the United States.

4. Mrs. Sunshine K. Snyder is an owner of property located at 327 Kenilworth Place, Memphis, Tennessee which is approximately 1150 feet away from the proposed route of Project No. 140-1(90)3 (as described in paragraph 10 below). That property will be adversely affected by the construction of that project and its use as an Interstate Highway. Mrs. Snyder pays taxes to the City of Memphis, the State of Tennessee and the United States.

5. Sierra Club is a nonprofit California corporation which has its principal office in San Francisco, California. It has 70,000 members and is active throughout the United States in promoting the public use of and preserving and protecting the natural resources of the United States.

6. The National Audubon Society, Inc. is a nonprofit membership corporation organized and existing under the laws of New York with its principal office in New York, New York. It has been active continuously since its foun-



dation in 1905 in engaging in activities involving preservation, protection, conservation and improvement of natural areas and the quality of the environment in the United States.

### *Defendants*

7. Defendant John A. Volpe is the Secretary of the Department of Transportation and as such has responsibility for the administration of the various federal-aid highway programs, including that relating to the National System of Interstate and Defense Highways (the "Interstate System") of which Project No. I-40-1(90)3 is a part.

8. The defendant Charles W. Speight is Commissioner of the Tennessee Department of Highways and in that capacity is responsible for planning, designing and constructing highways, including federal-aid highways, in the State of Tennessee.

### *Overton Park*

9. Overton Park is a 342-acre park and recreation area located in midtown Memphis, Tennessee. Since 1901 it has been publicly owned by the City of Memphis. Within the park are located the Overton Park Zoo, a 9-hole municipal golf course, an outdoor theater, an art gallery, an art academy, a nature trail, a bridle path, a small lake, a formal garden, picnic areas and playgrounds and substantial woodland. In 1967 approximately 1½ million people visited the Zoo alone.

### *Project No. I-40-1(90)3*

10. Federal-Aid Highway Project No. I-40-1(90)3 (the "project") is a six-lane, limited access, interstate highway to be used for private and commercial purposes which is a portion of Interstate Route 40. The project will begin at McLean Boulevard in Memphis, Tennessee and extend eastward proceeding through the entire width of Overton Park,

a distance of approximately 4,800 feet, and then extend to Maris Street. At the western end of Overton Park, the project will be approximately 250 feet in width; at the eastern end it will be approximately 450 to 500 feet in width. There will be a 1,200-foot access ramp within the eastern end of the park. The project will include a 40-foot median strip between the eastbound and westbound lanes. The current plans contemplate that the project will vary between being slightly depressed in some areas to a five- to six-foot fill at Lick Creek. It will not be tunneled. The project will require the use of at least approximately 26 acres of Overton Park. It will affect adversely many more acres. The right of way for the project runs along one side of the Zoo, one side of the playgrounds, and the playing fields, passes by the tip of the lake, and then passes through a heavily wooded area of the park. Construction of the project and its use as an interstate highway will have an adverse effect on the Zoo, the playing fields, use of the lake and will require the destruction of some of the wooded area in the park.

11. On April 19, 1968, the Federal Highway Administrator preliminarily approved the proposed location of the project.

12. On or about June 4, 1969, the Department of Highways for the State of Tennessee (hereinafter the "Tennessee Highway Department") requested that the defendant Volpe or his subordinates approve a design of the project which the Tennessee Highway Department submitted to the United States Bureau of Public Roads. On or about November 5, 1969, defendant Volpe approved that proposed design. Alternatively defendant Volpe approved that design on the condition that the design be modified in accordance with certain requirements which he stipulated. The Tennessee Highway Department has given notice that the design of the project will be modified according to defendant Volpe's stipulation.

13. On or about November 10, 1969, the City of Memphis transferred to the State of Tennessee property in Overton Park for the right of way for the project. The Tennessee Highway Department has stated that on or about December 19, 1969, it proposes to take bids for construction of parts of the project, including a part of the project which will pass through Overton Park.

14. The Tennessee Highway Department is proceeding with the construction of the project on the assumption that it will receive from the Federal Government, pursuant to an obligation undertaken by defendant Volpe, reimbursement of up to 90 percent of the costs of the construction of the project. The Tennessee Highway Department would not proceed with construction of the project if it believed that such Federal funds could not lawfully be paid to the State of Tennessee.

15. If defendant Volpe is enjoined from taking any further action with respect to the project or enjoined from obligating the Federal Government to reimburse, or from reimbursing or paying, the Tennessee Highway Department 90 percent of its cost of the construction of the project, the Tennessee Highway Department will not construct the project through Overton Park. Unless defendant Volpe is so restrained, the Tennessee Highway Department will begin construction of that part of the project which passes through Overton Park immediately after taking bids.

*Violations of Federal Statutes*  
23 U.S.C. § 128

16. Section 128 of Title 23 provides:

“(a) Any state highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hear-

ings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

“(b) When hearings have been held under subsection (a), the State highway department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification.”

Paragraph 8.c(1) of the Policy and Procedure Memorandum 20-8 (hereinafter PPM 20-8), 34 Fed. Reg. 727 (1969) 23 C.F.R. App. A, promulgated by the Department of Transportation to implement 23 U.S.C. § 128 provides:

“(1) The State highway department shall provide for the making of a verbatim written transcript of the oral proceedings at each public hearing. It shall submit a copy of the transcript to the division engineer within a reasonable period (usually less than 2 months) after the public hearing, together with:

“(a) Copies of, or reference to, or photographs of each statement or exhibit used or filed in connection with a public hearing.

“(b) Copies of, or reference to, all information made available to the public before the public hearing.”

Paragraph 8.b(2) provides:

“(2) Provision shall be made for submission of written statements and other exhibits in place of, or in addition to, oral statements at a public hearing. The procedure for the submissions shall be described

in the notice of public hearing and at the public hearing. The final date for receipt of such statements or exhibits shall be at least 10 days after the public hearing."

17. On May 19, 1969, the Tennessee Highway Department held a public hearing with respect to the project. According to the notice published by the Tennessee Highway Department the objectives of the hearing were:

"to provide the local officials and other citizens with complete factual information with respect to the tentative schedules for right-of-way acquisition and construction, and the location, the design features, and the economic, social and environmental effects which the project will have on the community and to acquaint the public with the relocation assistance offered by the State to those persons whose homes or businesses may be affected because of the proposed construction of said project. Following the presentation the local officials and citizens will be afforded the opportunity to be heard relative to the project to provide the Department with factual information which is pertinent to the specific location and major design features, including the social, economic, environmental and other effects thereof, which will best serve the public interest."

18. On or about June 4, 1969, a transcript containing some of the testimony given at the May 19, 1969, hearing was submitted to the Bureau of Public Roads. The Tennessee Highway Department, by Mr. Henry K. Buckner, certified to the Bureau of Public Roads that the transcript was a partial true transcript of all that was said at this hearing. It also certified that:

"the Department of Highways has considered the economic and social effects of the location of the project, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the affected community."

19. The transcript of the public hearing held on or about May 19, 1969, which the Tennessee Highway Department submitted to the defendant Volpe, did not contain testimony of at least eight witnesses who appeared and gave oral testimony at that hearing. Six of those witnesses opposed either, or both, the location and the design of the project.

20. The Tennessee Highway Department has not submitted to defendant Volpe a copy of the verbatim written transcript of the oral proceeding at the public hearing held on or about May 19, 1969, with respect to the project. Defendant Volpe's approval of the project without having received such a transcript violated 23 U.S.C. § 128(b) and PPM 20-8, Paragraph 8.c(1).

21. The notices of the public hearing scheduled for May 19, 1969, published in the *Commercial Appeal*, Memphis, Tennessee, on April 15, 1969, and May 12, 1969, did not describe the procedure for submission of written statements and other exhibits in place of, or in addition to, oral statements at the public hearing. These notices did not comply with 23 U.S.C. § 128 and the rules promulgated thereunder by the Department of Transportation, including PPM 20-8, Paragraph 8.b(2), 34 Fed. Reg. 727 (1969), 23 C.F.R. App. A. In the absence of proper notices, the hearing on May 19, 1969, did not comply with 23 U.S.C. § 128 including the rules promulgated thereunder by the Department of Transportation including PPM 20-8, Paragraph 10.d. Defendant Volpe's approval of the project in the absence of the hearings that comply with section 128 is illegal.

22. For the reasons stated in paragraphs 16-21, defendant Speight and the Tennessee Highway Department have not held a public hearing in compliance with the requirements of 23 U.S.C. § 128 and PPM 20-8. Defendant Speight has agreed with Volpe to construct this project. In the absence of a lawful hearing, construction of this project will be illegal.

*23 U.S.C. §138, 49 U.S.C. §1653(f)*

23. Section 138 of Title 23, United States Code, provides:

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

24. Construction of the project will require use of a number of acres of park land and recreation area from Overton Park. Overton Park is a park and recreation area of state and local significance. Overton Park has been determined by the state and local officials having jurisdiction thereof to be of state and local significance.

25. Neither defendant Volpe nor any previous Secretary of Transportation has made any finding that there is no feasible and prudent alternative to the use of such public park and recreation areas. Defendant Volpe has made no finding that the program for the project includes all possible plan-

ning to minimize the harm to such park and recreation areas. In the absence of such findings, his approval of the project has violated 23 U.S.C. § 138 and 49 U.S.C. § 1653(f).

26. There are feasible alternatives to the use of such park and recreation areas. One or more of the feasible alternatives are prudent alternatives. The project does not include all possible planning to minimize harm to such park and recreation areas.

27. Defendant Speight has agreed with defendant Volpe to construct this project as a federal-aid Highway. For the reasons set forth in paragraphs 23-26, defendant Volpe's approval of this project, and any action based on that approval, violates 23 U.S.C. § 138 and 49 U.S.C. § 1653(f). Unless restrained, defendant Speight will construct this project in accord with his agreement with defendant Volpe and thereby aid, abet, assist Volpe in constructing this project in violation of 23 U.S.C. § 138 and 49 U.S.C. § 1653(f).

28. Defendant Speight, in proceeding with the construction of this project, is proceeding upon the assumption that in due course the State of Tennessee will receive from the Federal Government, pursuant to an obligation undertaken by defendant Volpe, 90 percent of the cost of the construction of the project. He would not be proceeding with the construction of the project if he believed that such Federal funds could not lawfully be paid to the State of Tennessee. If defendant Speight proceeds to obligate funds for the project, and if it is then determined that the requirements of Title 23 of the U.S. Code and the administrative regulations and directives promulgated thereunder have not been satisfied, the State of Tennessee will not be eligible for Federal aid reimbursement of the costs of the project and the entire financial burden of the project will fall on Tennessee revenues.

#### *23 U.S.C. § 102*

29. Defendant Volpe plans to treat his approval of the project as a contractual obligation of the Federal Govern-



ment and to make expenditures to the State of Tennessee pursuant thereto. Because that approval, having been given in violation of 23 U.S.C. §§128, 138, and 49 U.S.C. §1653(f), is null and void and without legal effect, such expenditures will violate 23 U.S.C. §102.

30. In the absence of a lawful hearing and in the absence of consideration of, and compensation for the taking of, plaintiffs' interest in Overton Park, the Secretary's approval of the project was illegal and in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

### *Prayer*

WHEREFORE, Plaintiffs pray as follows:

1. That the actions and proposed actions of the defendants alleged herein be declared and adjudged unlawful;

2. That the defendants be permanently enjoined from taking any further action whatever relating to the project unless and until he has complied with the provisions of Title 23 of the U.S. Code, and other statutes referred to herein;

3. That pending disposition of this action, this Court preliminarily enjoin the defendants from (1) taking any further action with respect to the Federal-Aid Highway Project No. I-40-1(90)3 (the "project"), (2) treating the approval of the design of the project which defendant Volpe granted on or about November 5, 1969, as a basis for any further action with respect to that project, or (3) obligating or disbursing any funds to the Department of Highways for the State of Tennessee for this project;

4. That the plaintiffs recover costs and attorney fees; and

5. That the plaintiffs have such other and further relief as the Court may deem appropriate.

John W. Vardaman, Jr.  
Wilmer, Cutler & Pickering  
900 17th Street, N.W.  
Washington, D.C. 20006  
Telephone: (202) 296-8800

*Attorney for Plaintiffs*

January 30, 1970

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE  
[Caption omitted in printing]

**AFFIDAVIT**

I, ROBERT CONRADT, after being duly sworn, do hereby depose and say:

I am currently a professional consultant in transportation planning. I have a Bachelor of Science degree from California Institute of Technology and a certificate in Traffic Engineering from Yale University. I have had 20 years experience in the field of traffic and highway engineering and transportation planning.

I served as traffic engineer and assistant traffic and safety director for the New Mexico State Highway Department. I was with the New Mexico State Highway Department from 1950 to 1957.

In 1957 I joined the transportation engineering firm of De Leuw, Cather and Company. Between 1957 and 1965, among other things, I was a project engineer in charge of comprehensive transportation planning studies for Auckland and Dunedin, New Zealand and I served as a project engineer and project manager for the location and geometric design of freeways in Sacramento, California, Las Vegas, Nevada and Salt Lake City, Utah.

In 1965 I worked with the architectural and planning firm of John Carl Warnecke and Associates and I participated in the planning of major street and highway improvements in Washington, D.C., San Francisco, California, and Honolulu, Hawaii.

In 1966 I became Head of Highway Planning and Design for De Leuw, Cather and Company of Canada Limited in Toronto, Ontario. I specialized particularly in the functional planning and design of freeways and arterial highway systems in urban areas, and I served as a consultant on the planning of traffic facilities for the Walt Disney World project in Florida and served as a special advisor to the architects on the urban design concept team for the study of proposed Interstate highways in Baltimore, Maryland. I served as a lecturer to engineers from various highway departments on the subjects of highway design and transportation planning in university courses and training seminars in Pennsylvania, Missouri, Alaska, New York, South Africa and in several provinces in Canada. I also directed a research project for the Department of Highways of Ontario for the purpose of developing a new urban transportation planning procedure.

In 1969 I became an independent transportation planning consultant. I advised opponents of the proposed Riverfront Expressway in New Orleans, Louisiana, on the highway planning and design aspects of the proposal and I served as traffic consultant to the planners for a large land development project near Orlando, Florida. I also entered into an agreement with De Leuw, Cather and Company of Canada Limited to serve them as a special consultant on projects in Canada.

At the request of Mr. John W. Vardaman, Jr., I traveled to Memphis, Tennessee, to examine that portion of the proposed route of Interstate 40 which is proposed to pass through Overton Park. I was asked to review the proposed location and the surrounding areas and to comment on the appropriateness of that portion of the route which is proposed to pass through Overton Park and upon the availability of alternative routes.

I made a tour of the Memphis urban area and examined in some detail that area between the proposed interchange of I-40 and Route 255 west of the park and the point to which actual construction has proceeded on the eastern side of the park which is approximately at Bon Air Street. In addition, I studied maps of Memphis and the surrounding area and reviewed in some detail the June, 1958, Report Upon ALTERNATE LOCATION STUDIES-FAI 505, Memphis and Selby County, Tennessee, prepared by Harland Bartholomew and Associates, and the report, TRANSPORTATION PLAN, Volume I, of the 1968 Memphis Urban Area Transportation Study, prepared by Harland Bartholomew and Associates.

My conclusions are:

1. That although the planning of the route has been thorough with regard to the consideration of engineering factors such as construction costs, travel distances, and the treatment of alignment, grade, bridges, retaining walls and drainage, it has not adequately considered the full value of Overton Park nor the total economic, social, environmental and long-range transportation effects of the proposed route;
2. That even given the present state of right-of-way acquisition for this route, it is not obvious that the proposed route through Overton Park is the most appropriate for this project;
3. That on the basis of my inspection and the studies I have examined, I would not and could not at this time make a finding that there are no feasible and prudent alternative locations;
4. That there are two potential corridors which, upon detailed study might prove to be preferable alternatives to the presently proposed route. These alternatives are: (a) a corridor which would turn northward at the point where the present route crosses Cyprus Creek east of the park. The corridor would follow Cyprus Creek to a point close to Jackson Avenue at which point it would turn westward.

It would parallel Jackson Avenue until it reached the L and N railroad tracks. It would follow the railroad tracks to a point in the vicinity of North McLean Boulevard and proceed southwesterly until it rejoined the presently proposed route, and (b) a corridor to the south of Overton Park which would turn southeasterly from the present route in the vicinity of Avalon Street, west of the park. It would proceed from North McLean Boulevard to North Cooper Street through the area between Jefferson Avenue and Madison Avenue. It would follow along Union Avenue to Poplar Avenue where it would turn northeasterly and rejoin the presently proposed route at Bon Air Street east of the park.

5. That from the standpoint of sound urban planning, it would be imprudent to proceed with the route through the park without undertaking a study to determine the feasibility of these or other alternative routes. The study should include expert advice on the full social, economic and environmental values of the park, the potential influence of the proposed construction on the adjacent neighborhoods in the vicinity of the park and the opportunities for desirable new urban development created by the route.

The following comments are to further explain the bases for my conclusions stated above.

It is obvious to me that Overton Park is an extremely valuable asset to the city of Memphis. That asset will be severely damaged by construction of the proposed route. I believe it is possible through use of an alternative corridor to achieve nearly the same transportation goals achieved by the proposed route. It is not possible, however, to relocate the park.

Based on my experience in planning and designing urban freeways, I believe that in any case where a proposed freeway, such as I-40, will pass through an urban area, a thorough analysis of the effects of the project including analysis of the effects of alternative locations should be made before the freeway location is decided. The construction of a new freeway should be viewed as a catalyst to development of

the area, and the freeway should be located and designed to serve existing development and to encourage new development in a way that is consistent with community desires and values.

Since the construction of such a project will have far-ranging economic and social effects, a study to determine the proper location of the route should analyze not only the construction cost, the right-of-way cost and the transportation needs to be served but should also identify the social and economic effects of the alternative locations. In addition, an evaluation of the alternative routes should be made on the basis of which route is most likely to encourage and allow development of the entire area in the most desirable fashion. After such a study the alternative routes can be evaluated and one can be chosen on the basis of what will be best from the standpoint of overall urban development.

With respect to the particular situation involving I-40 in Overton Park I believe it would be a serious mistake for the city to complete construction of the proposed route through Overton Park without making the type of analysis discussed above of the presently proposed route, of the alternatives I have outlined and possibly of other alternatives.

I understand that selection of any other route would cause further destruction and dislocation because of the additional right-of-way acquisition which would be necessary. However, the disruptive effects of additional right-of-way acquisition and construction could be minimized by proper urban planning and the long-range effects of selecting another route could be extremely important and beneficial to the city.

Before I could conclude that the present route through the park is the most appropriate route or that other alternative routes are not feasible and prudent, I believe that an analysis of the following factors should be made with respect to each of the possible alternative locations:

1. The total impact on Overton Park and the significance of that impact in terms of social, economic and environmental costs.

2. The requirements for expansion, reconstruction or improvement of the park in order to overcome the impact of the highway construction.

3. The impact on the neighborhoods adjacent to the route, including an assessment of the likely economic and social pressures for redevelopment and desirability of such redevelopment.

4. The opportunities for redevelopment and for new development adjacent to the route and in the right of way of the route. Such development could take advantage of the park nearby and of the new transportation service provided by the route to support a higher density of development in the corridor.

5. The possibilities for establishing the feasibility of a future rapid transit service to the central business district by encouraging higher development densities in the I-40 corridor related to construction of the new route and the availability of the park to the residents who would live in the new high density developments.

I think it is quite important to determine what might be accomplished by redevelopment within the immediate area of each alternative location. The construction of the route will have a strong effect on the adjacent areas within a substantial distance from the right-of-way limits. The effects on land values, zoning, neighborhood sociological structure, environmental quality and other such non-highway factors, could be more significant to the people of Memphis than the transportation service provided by the new route. Therefore, these urban planning factors should be considered carefully.

Only after such an analysis could a prudent selection be made from the various alternatives. An analysis of this nature could be made within a relatively short period of

time provided it were carried out by a qualified team of persons with sufficient experience in urban development economics, urban planning, urban design, social analysis, landscape architecture and transportation. Once the team and the available maps and information were assembled the analysis could be made within 60 to 90 days.

/s/ Robert Conradt

[Subscription omitted in printing]

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IN THE  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DIVISION OF TENNESSEE

[Caption Omitted in Printing]

A F F I D A V I T

I, HENRY K. BUCKNER, JR., Department Attorney for the Tennessee Department of Highways, depose as follows with respect to the allegations in the complaint on the question of violations of Section 128 of Title 23, United States Code 1964 ed.

The Commissioner of Highways has placed with me the responsibility for carrying out the requirements of said Section 128. It is my opinion that the Department has fully considered the economic and social effects of the involved location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as promulgated by the City of Memphis. Reference is made to the partial transcript of the public hearing in question for further opinion in this regard, and the subsequent approval thereof by the Secretary of Transportation.

This approval would appear to be evidence of the Secretary to use discretion on a matter of policy, as is the ques-



tion presented here; namely, the adequacy of the public hearing process employed, so long as the above mentioned considerations have been adhered to.

It is my opinion that the objectives of a public hearing are to provide an assured method for the State to furnish the public with pertinent information concerning highway project proposals and in turn every interested resident is afforded the opportunity to be heard on such proposals. I believe the foregoing sums up the various statements in Policy and Procedure Memorandum 20-8 of January 14, 1969.

If the foregoing be accepted it must follow that an interested resident could not provide pertinent data without having had the benefit of first hearing the proposal of the Department through attendance at the hearing. If there had been attendance such a person would be aware of the provision for written submissions because of my announcement in this regard.

The hearing in question was the second of the two types provided for in the PPM; namely, a "Highway Design Public Hearing". The stated purpose is ". . . to insure that an opportunity is afforded for effective participation by interested persons in the process of determining the specific location and major design features. . . ." Secondly, the only reasonable interpretation of this statement is that attendance is a necessary prerequisite. How else could there be "effective participation"?

The foregoing is to say that no defect in the newspaper notice exists as alleged.

The failure to provide a verbatim transcript has not diminished the quality thereof in my opinion for the reason that absolutely no information was received or views expressed which are different from those as stated on the record by one or several other participants. However, because of a directive from the Bureau of Public Roads that the transcript would not be considered complete until those

participants whose statements were not recorded, were given the opportunity to submit a written statement for the record, I caused a letter (by certified return receipt mail) to be written to each of such participants, inviting the submission of a written statement. Accordingly, in my opinion, no detriment resulted by virtue of the failure to provide a verbatim transcript.

FURTHER DEPONENT SAYETH NOT, this the 18th day of February, 1970.

/s/ Henry K. Buckner, Jr.

Sworn and subscribed to before me,  
This the 18th day of February, 1970.

Edna S. Brady  
Notary Public

My Commission expires:  
1/28/71

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UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF TENNESSEE

[Caption Omitted in Printing]

**AFFIDAVIT OF WILLIAM S. POLLARD, JR.,  
FILED ON BEHALF OF CHARLES W. SPEIGHT,  
COMMISSIONER, TENNESSEE DEPARTMENT  
OF HIGHWAYS**

STATE OF TENNESSEE  
COUNTY OF SHELBY

I, William S. Pollard, Jr., do on oath state the following facts:

I.

That I am 45 years of age and have been a resident citizen of Memphis, Shelby County, Tennessee, for approximately 10 years. My profession is that of civil engineering and I hold degrees of Bachelor of Science and Master of Science in this field from Purdue University. I was an instructor at this university from 1948 to 1949 and was an instructor as well as an assistant professor of civil engineering at the University of Illinois from 1949 through 1955. At the present time, I am a senior partner in the planning firm of Harland Bartholomew & Associates and have been in charge of the Memphis, Tennessee, office since 1960. Prior to this time, I served as chief engineer of this firm where I directed civil engineering work, transportation facility location studies and design projects and interstate highway design, particularly in Memphis, Shelby County, Tennessee. The Memphis office of Harland Bartholomew & Associates has a staff of approximately 80 persons; and, in addition to numerous other projects which our firm engages in, the Memphis office has either done or is now engaged in comprehensive transportation plans and other

urban area development plans including the location of urban freeway locations for Birmingham, Alabama; Memphis, Tennessee; Durham, North Carolina; Raleigh, North Carolina; South Bend, Indiana; Jacksonville, Florida; and Mobile, Alabama.

I am a fellow of the American Society of Civil Engineers, and serve as Secretary-Member to the Technical Council on Urban Transportation Executive Committee, Member of the Executive Committee of the Urban Planning and Development Division, Member of the Council on Environmental Systems, Chairman of the Urban General Planning Committee of the Urban Planning and Development Division. In August 1965, served as Chairman of the Engineering Foundation Research Conference on Engineering Design to Fit the Environment, a member of the American Institute of Consulting Engineers, the Highway Research Board, the Illuminating Engineering Society, the Institute of Traffic Engineers, the National Society of Professional Engineers, the New Jersey Society of professional Planners, and the Society of American Military Engineers. I hold a professional engineer's license in 45 states and the District of Columbia. I have written numerous papers and articles on the subjects which are to be covered in this affidavit and am the author of Chapter 18 "Long-Range Urban Traffic Planning," Institute of Traffic Engineers, Traffic Engineering Handbook.

The firm of Harland Bartholomew & Associates was founded in 1919 for the purpose of providing professional guidance on comprehensive long-range planning to communities. The firm has provided transportation plans for many cities and regions throughout the United States and internationally. These plans have included major streets and highways, public transit, rail, airports, ports and harbors, and parking. The present system of Interstate and Defense Highways is an outgrowth of the Interregional Highway Plan for which Mr. Bartholomew was an urban highway specialist member of the 7-man committee appointed by President Roosevelt.

Comprehensive plans have been prepared by our firm for more than 200 cities in the United States, Canada, the Phillipine Islands, and Morocco, as well as a number of counties and regions. In addition, the firm has provided professional services in other fields, including plans for new cities, military installations, parks, parkways, greenbelts and recreational areas, resort areas, residential developments and land subdivisions, urban renewal and housing, commercial developments, school and public buildings, sanitation water supply and drainage, colleges and universities, shopping centers, industrial complexes and central business district revitalization.

One of the early studies of my firm was a comprehensive city plan for Memphis, Tennessee, completed in 1924, which plan concerned itself with zoning, civic art, recreation, transportation and transit, subdivision controls, and a basis for establishing a city planning commission ordinance. In the 1930's the comprehensive city plan for Memphis was revised by my firm and included consideration of all elements of comprehensive planning. In the early 1950's my firm was again engaged by Memphis to bring up-to-date their zoning ordinances, their subdivision regulations, their transportation planning, their schools, parks, and recreation plans which culminated in a summary report entitled "A Report Upon the Comprehensive Plan" dated December 1955. In its full context, this report includes the proposed location of the east-west Interstate here discussed.

In 1956, my firm prepared for the Board of Commissioners of Shelby County, Tennessee, certain elements of a County comprehensive plan; namely, major streets and highways and subdivision regulations.

Involved in the foregoing described studies for Memphis, Tennessee, were different professional members of our multi-disciplinary staff, some of whom had continuity from the earliest plans in the 1920's. Our staff, at that time and at this time, was comprised of experienced practicing professionals with background experience and training in the

fields of landscape architecture, socio-economic consideration, civic art, civil engineering, civic design, land planning, zoning, comprehensive urban and regional planning, park and recreation planning, transportation planning, architecture, law, and ancillary supportive disciplines.

In summary emphasis, I would observe that we operate using multi-disciplinary teams from our several offices as we address ourselves to extremely complex problems as those we routinely encounter in our practice, which is primarily city planning and secondarily engineering. Over the years, more than 50 reports done by our multi-disciplinary group have related to questions inherent in this issue. Literally, man decades of multi-disciplinary time have been spent in such investigations. They have been comprehensive and not single purpose in character.

## II.

Prior to the passage of the Interstate Highway Act in 1956, Harland Bartholomew & Associates was engaged by the City of Memphis and other interested governmental bodies to prepare and recommend a plan in anticipation of the passage of such an act. Without going into detail, suffice it to say that the preparation of such a report required thousands of man hours of work, preparation and study of every conceivable factor which would affect the final decision of the location of the freeways or expressways in Memphis, Shelby County, Tennessee.

It should be said at the outset that the major criteria which a long-range planner must guide himself with in such a situation involve basically the needs of the community as a whole. In regard to the traffic and transportation problems facing the community, naturally, there are many other criteria, including engineering feasibility, economics, disruption of the community, including the effect which the freeway or expressway may have upon buildings, parks, schools, industry, and the like. It should also be borne in mind that the planner begins with the city as it exists, which includes

its street layout, its land use, and its population habits regarding traffic in getting from land use to land use.

This first study above mentioned was completed in 1955 and it was the recommendation of Harland Bartholomew & Associates that the general freeway plan for a circumferential expressway around the city crossed by a north-south route west of the center and an east-west route north of the center was the most feasible and prudent system for this locality. This east-west route or corridor included the passage of the right-of-way through the area that is known as Overton Park. The decision was not based upon the presumptions that the taking of park land might be more economical. It is obvious that designing a system such as herein described includes literally thousands of ideas all of which are interrelated to each other. A system such as the Memphis plan was designed to operate properly only when kept intact. Perhaps nowhere is the truism "everything is related to everything else" more appropriate to keep in mind than in such matters as the planning of urban areas to best serve the total needs of people. These total needs, of course, include a place to live, a place to work, a place to play, and a way to get from each of these places to the others with maximum safety, amenity, and economy. It is that people choose to use automobiles as the primary means of moving themselves from place to place that occasioned the need for major streets and thoroughfares, inclusive of expressways of the sort that this interstate location represents.

Successful, responsive, and responsible comprehensive planning considers the interrelativity of all facets of urban living and establishes proportionality of consequences in ultimately arriving at recommendations. There are trade-offs, and some are positive and some are negative. The optimum is sought. If any element of a comprehensive plan is left out or located so as not to be responsive to the need, the effect of the absence of the service is felt throughout the remainder of the system left to serve the needs of the people. For a transportation element, this effect could

manifest itself in congestion, in reduced safety, in added circuitry, and in not accomplishing the desires of the people to move from place to place; the absence of these needed elements within the system would normally be compensated for by widening of streets within the urban area or by locating a new facility elsewhere and not necessarily responsive to the location of the need. In short, the total area system need in an urban context of the general density of Memphis requires a balanced system of major streets and thoroughfares, some of which should be expressways. Normal and acceptable levels of service to people in an urban area are achieved under spacings of major streets and thoroughfares in a crude "grid" averaging approximately one-half square spacings of four or six moving lane major streets or thoroughfares. Such a grid normally constitutes approximately only 20% of the total street and thoroughfare mileage within the developed urban area and yet this grid normally provides from 70% to 80% of the total urban area traffic service. In developed areas added traffic relief and service to the urban area populace may be obtained by widening existing major streets and thoroughfares, by upgrading them to higher capacity facilities in their present locations or by the addition of new facilities. Since limited access expressway facilities can accommodate approximately three times the traffic volumes per lane that a conventional major street can, and since these expressways can accomplish this at a much greater level of safety, it is not uncommon to find in a comprehensive analysis that the total community interest is best served by the addition of a new expressway facility rather than by widening present facilities throughout the urban area, if even possible, in order to obtain a corresponding level of service. The principles just cited bear very heavily on the quite involved analysis of alternative possibilities for accomplishing the best appropriate service to the people of Memphis in locating this particular element of the Memphis and Shelby County Street and Thoroughfare System, which only coincidentally is an element of the Interstate and Defense Highway System. Its



context for judgment as to appropriateness and adequacy of service is as an element of the Memphis and Shelby County Street and Thoroughfare System and as it relates to serving the total interests of the Memphis and Shelby County populace, both present and anticipated during the reasonable life expectancy of the Interstate element.

### III.

The firm of Harland Bartholomew & Associates through its Memphis branch under my direction and supervision was called upon by various local governmental agencies to prepare additional plans and recommendations after the passage of the Interstate Highway Act. These recommendations, all of which were completed prior to the passage of the amendment affecting the taking of park lands in 1966 and amended in 1968. These studies were extremely comprehensive and were intended as a double check upon the earlier recommendations, taking into consideration any changes in the area or the habits of the populace in the ensuing years. Basically, the recommendations contained in these various studies were substantially the same in regard to the general routes of the expressway system as they had been previously. In no case has any recommendation ever been made by either me or my firm based upon the expedient that it was easier or cheaper to use routes which took park land.

In this connection, it is well to state at this time that, as shown above, our firm has been engaged on numerous occasions for the purposes of park planning; and it has been the policy of the company to recognize the great need for parks and recreational areas in all of our urban planning. It has also been the firm conviction of Harland Bartholomew & Associates, as well as myself, long prior to the passage of the aforementioned Act that the taking of park lands for road purposes or for that matter any purpose other than its use as a park should be avoided wherever it is feasible or prudent to do so.

## IV.

Though the studies mentioned above contain many hundreds of pages with accompanying maps and statistical data I will attempt to condense the basic reasons which brought about the decision to recommend the location of the east-west expressway route in Memphis along the general corridor which is now being acquired and which is somewhat north of the center of the city. Basically, our long-range urban planning through the years has indicated a growth to this city which would eventually necessitate a total of more than six lanes of east-west expressway, not including those portions of the circumferential expressway which run in an east-west direction.

Experience with urban thoroughfares has fairly conclusively demonstrated that expressways should be designed with a maximum of eight through lanes. Thus when the people of an area have traffic needs which require more than six lanes in a corridor to be served, sound comprehensive planning seeks a second corridor and a spacing of parallel facilities in order not to violate the principle just espoused. This is appropriate to Memphis and reflects in the present transportation plan for the Memphis and Shelby County area. The plan includes a second internal east-west expressway along Southern Avenue and paralleling the Southern Railroad, generally coursing the entire east-west distance through the city. It is the south-of-center equivalent of Interstate Route 40 which is the north-of-center facility element of the total system necessary to meet the desire not to exceed six lanes per expressway if possible while keeping the expressway appropriately related to a total system. In other words, a northern east-west route and a southern east-west route is what, in our opinion, proper long-range planning indicates. Our feasibility studies and the present traffic flow along with that which could be reasonably anticipated in the near future showed that the northern east-west route should be built first. Sound planning also most strongly indicates the need for this route to

be near and south of the major arterial road of Summer-North Parkway (the northern boundary of Overton Park). The present transportation plan includes both.

## V.

On the basis of all of the studies which have been made by both me personally and under my supervision and based upon my own personal knowledge and experience in this field, it is my considered opinion that it would have been neither feasible nor prudent to have placed the east-west route of the expressway at any other location. In other words, as explained above, the alignment recommended in my opinion, the most feasible and prudent of all reasonable alternatives possible. As a matter of fact, my firm made a study in June 1958 entitled "Alternate Location Studies - F.A.I. 505, Memphis and Shelby County, Tennessee," and it was "recommended that there be no change in the alignment," which is involved here.

## VI.

Though neither I nor my firm has participated in the actual design or study work regarding the suggested alternatives which have come to the fore since so many major portions of the east-west route have either been acquired or under construction; that is, the two plans which in simple terms loop around the Park area to the north or the south, I have followed their progression with great interest. It would likewise be my considered opinion that neither of these alternatives would be feasible or prudent when compared with the proposed route through the Park, especially in view of the great care which has been taken to minimize all possible harm to the Park.

I have read the affidavit of Mr. Robert Conradt, which I understand has been filed in this cause. In general terms, he states that a number of considerations of a comprehensive type should be made and that they should be made

utilizing the services of a multi-disciplinary team. Being careful to limit the extent of his observation to that of a visit to Memphis and to referencing himself to two reports, both of which postdated the in-put essentials to route determination in this instance, he stated that many considerations were timely, appropriate, and pertinent to the question of such a location; I agreed with Mr. Conradt, but only with emphasis that all such considerations as those he has set forth as being appropriate, plus many more which he would be well to advise himself of in the past documented history of this question, have long ago been made and were indeed made, validated and revalidated up to the present time in the fullest context of comprehensive urban planning which seeks considerations to achieve an optimized environment; in short, the best possible place for people to live, to work, to pursue happiness with maximum safety, amenity and economy. As I have observed elsewhere herein, everything is related to everything else. A comprehensive city planner realizes this and uses this. We did.

I would speak to the point of one other remark in Mr. Conradt's affidavit, that being his remark that "only after such an analysis could a prudent selection be made from the various alternatives"—I agree with that observation and emphasize that we have already made such analyses in great depth, utilizing our own experienced multi-disciplinary teams and requiring man decades to accomplish. My disagreement lies with his suggestion that a matter as intrinsically complex as the question of this location within the full urban context of Memphis with proper consideration of all affected systems could be done in a period of from 60 to 90 days.

Mr. Conradt again in generalities raised the question of altering density along the route, inserting transit and the like; to this I would be derelict not to respond by observing that the official alignment for this route has been set since its inclusion in the 1955 comprehensive city plan, and that subsequent plans, both public and private, with reference to land and investments, have presumed this location.

I question not giving in depth and careful consideration to that degree of involvement of the public and private sector of what they have long presumed a decision long ago made. As a specific example, the long-range land use plan for the future development and redevelopment of the Memphis urban area presumes a number of new urban centers with very careful comprehensive consideration of density alterations in the fullest context of that comprehensive long-range Memphis land use plan; this is a very different context in my opinion from that of changing density in conjunction with a localized alignment alteration to achieve a single purpose.

/s/ William S. Pollard, Jr.

Sworn to and subscribed before me, this the 19th day of February, 1970.

Notary Public

My commission expires:  
9/30/72

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UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF TENNESSEE

[Caption Omitted in Printing]

**AFFIDAVIT OF HAL S. LEWIS, ON BEHALF  
OF CHARLES W. SPEIGHT, COMMISSIONER,  
TENNESSEE DEPARTMENT OF HIGHWAYS**

STATE OF TENNESSEE  
COUNTY OF SHELBY

I, HAL S. LEWIS, being first duly sworn, make oath to  
the following facts:

I

I am a resident citizen of Memphis, Shelby County, Tennessee, having resided here 29 years. Since the year 1945 I have been the Executive Director of the Memphis Park Commission, with the general responsibility of the maintenance and supervision of all the parks in the city of Memphis, including the facilities thereon. I am also responsible for future planning with respect to the need for and location of new parks. I am directly responsible to the Memphis Park Commission, whose members are appointed by and responsible to the Mayor and the City Council. In the performance of my duties, I necessarily seek advice from and coordinate my efforts with other branches of the City government, such as the Memphis and Shelby County Planning Commission and the City Engineering Department.

II

The City Park System now comprises approximately 4,700 acres, of which Overton Park, consisting of 357 acres is a part. In addition to approximately 150 acres of unimproved wooded areas, Overton Park contains a golf course,

an art academy, an art gallery, a large zoo, an open air theater, playgrounds for small children, playing and practice fields, a small lake, and picnic areas. There are a number of roads throughout the Park and various parking areas to accommodate the users of the facilities described above.

I have been intimately familiar with this Park for a great many years, both in my official capacity and as a citizen and user of the benefits of the Park. I have also been familiar, since the very beginnings of the controversy surrounding the possible building of the expressway through this park, with all the many phases of the matter, including its effect on the Park, both from an aesthetic standpoint and the useability of the Park and its many facilities after the completion of the construction of the expressway. I participated in the negotiations between the city of Memphis and the state of Tennessee for the purchase of the right-of-way which culminated in the payment by the state of Tennessee of approximately \$2,209,000. During these negotiations, it was a part of my responsibility to determine exactly which facilities might be affected by the expressway and to what extent. It was also a part of my responsibility to determine which facilities might be damaged or require relocation, and what would be the exact cost to the Park Commission to repair or relocate same in other portions of the Park so that the building of the expressway would not cause the loss of any facility or the use thereof. In this latter connection, I, together with the employees of the Park Commission, the City Engineer's Office and the Tennessee Highway Department, have coordinated our efforts to see that there was all possible planning to minimize harm to the Park and the recreational areas contained therein. It has also been one of my duties to aid the Park Commission in complying with a recently-enacted City ordinance which requires that funds received from the sale of park lands can be used by the city of Memphis only for the purpose of acquiring additional land for park purposes.

## III

As part of the above-outlined duties, I consulted with experts in the field of zoos and zoo planning, who advised that a suitable plan for the present and future needs of the Zoo could be devised within the confines of the present zoo area to the north of the bus line, or by utilizing available park land to the east of the Zoo and north of the bus line. Such a plan was devised and has already been implemented by the construction of some new facilities within the Zoo, such as an Aoudad mountain for goats and monkeys, a new concession stand and restroom, a Great Ape house, a sea lion pool, a snake house, an African veldt, seven moats for giraffes, antelopes and the like, and new sewers and utilities in the aggregate of approximately \$1,300,000. Future expansion and remodeling plans over the next few years for the Zoo call for the additional expenditure of approximately \$2,700,000 for future Zoo capital improvements, some of which are now being designed. There is ample land to the east, which does not now contain any improvements, to satisfy the foreseeable future requirements of the Zoo. Expansion of the Zoo to the south was hampered prior to any consideration of the expressway by the bus line previously mentioned, and the existence of very valuable private homes situated south of Galloway and east of McLean. It should be noted that this bus line is of a nonaccess type which cannot be used by any other vehicles. Pedestrians are permitted to cross this concrete strip, which is at grade level and approximately 25 feet in width, at the southern entrance to the Zoo and at park roads which cross it at grade level farther to the east.

The program conceived and approved by the Park Commission would allow for a pedestrian overpass at the southern entrance to the Zoo and one bridge to the east to avoid severing a park road which leads from the southern portion of the Park to the eastern entrance of the Zoo. The possibility of additional crossings of the proposed expressway depression has been considered in the past, but rejected for



traffic flow reasons which have nothing to do with the expressway.

The state of Tennessee has generally left the design of the pedestrian overpass to the Park Commission and the City Engineer. The structure will be without steps, and any grades will be handled with ramps to permit its easy accessibility by wheelchairs, bicycles, baby carriages and strollers. No bicycles or automobiles are now allowed in the Zoo. There will, of course, be no danger from traffic, as with the bus line, and the overpass will contain adequate guard rails and screens to prevent anyone falling therefrom. It will also be designed, as much as possible, to blend in with the present architecture of the Zoo entrance.

The bridge structure will also contain guard rails and, in addition, will contain sidewalks, since pedestrians now also use this crossing at the bus line, but now either walk in the roadway or on the shoulder of the road.

Naturally, in the many discussions and negotiations, proper provision has been made for all drainage of all natural creeks and ditches running through the Park, as well as the Zoo. There should be no damage of any kind as a result of the construction in this respect. As is to be expected, the construction of the expressway will necessitate the relocation of some utility services, such as sewers, gas mains and water lines, all of which items have been taken into consideration. All such services will be relocated, with no loss of their utility or effectiveness.

On the south side of the proposed right-of-way there now exists the parking area for the users of the southern entrance to the Zoo (the only other entrance for the public being at the east end, where parking is not affected), a playground for small children, an area used for playing fields or practice fields, a small lake and one of several picnic areas. The parking areas will be extended southwardly, and the playground will be relocated in another area of the Park. The picnic area and the playing field will be extended so there will be no appreciable loss of their functions and,

at the same time, no other facility of the Park will be affected or eliminated. The lake will not be touched. All relocation of items or construction outside the right-of-way or easements to be acquired by the State for construction purposes will be done or supervised either by me or representatives of the Park Commission to insure that such work will be done in a good and workmanlike manner, and that the natural beauty of the areas can be preserved, i.e., trees will be left in and around parking areas whenever possible.

A great deal of time and attention has been focused on the landscaping of the shoulders and median strip of the expressway, in addition to having the right-of-way depressed to its very limit in order to preserve the natural drainage of the creeks and ditches in the Zoo and Park, eliminating from view, as much as possible, the vehicles on the road and dampening any noise they might produce. Trees and shrubs, to be provided for in the State's construction costs, are to be chosen to compliment the existing natural foliage of the Park.

As a further part of my planning duties, both before and during negotiations over the project with the State, it was determined that, as an ounce of precaution, a natural embankment should be constructed along the north edge of the right-of-way, which is also the south edge of the Zoo, now separated from the rest of the Park by a fence. The purpose of this berm is to increase the effectiveness of the noise and aesthetic control created by the depressing of the roadway itself.

As an example of the extent to which all parties have developed the program is the fact that the State has agreed, through negotiations, and at its cost, to extend a culvert beyond the right-of-way so that it would serve as a bridge over an existing creek or ditch in the Zoo for a miniature train route projected in the future.

Other possibilities, such as a tunnel, have been considered and rejected by the City Engineer as impractical because of health or safety hazards that might be created in the event

pumping, lighting or ventilating equipment failed to function.

As with all expressways, the right-of-way will be completely fenced so there will be no danger of visitors, and especially children, being injured by getting on the roadway.

#### IV

After all the items above described were given careful study, it was next determined, through the retention of highly-qualified real estate experts, how negotiations should proceed insofar as the fair cash market value of the property is concerned. In all, the taking will comprise approximately 26 acres, of which about 23 acres are for the non-access part of the expressway. The remainder is to permit the State to relocate a park road and build the pedestrian overpass and foot bridge previously mentioned.

A careful analysis revealed that \$2,000,000 was an acceptable figure for the land taken, with which the Park Commission would be required to purchase, under the ordinance explained above, additional park lands. At the time of the preparation of this affidavit, a 160-acre tract containing a golf course and other valuable improvements has been purchased with a portion of the funds received from the State in the approximate amount of \$1,000,000. It is anticipated that at least this same amount of acreage can be purchased with the remaining \$1,000,000. In other words, an area almost the size of Overton Park can be added to the System for the 26 acres lost, a part of which was used by the bus line to begin with. In addition, the new park lands can be acquired in areas of new growth and can serve citizens of Memphis who do not live as near to Overton Park as do others.

## V

In addition to the \$2,000,000 agreed upon between the City and the State as being the fair cash market value of the property taken, the additional sum of \$209,149.00 was paid by the State, after extensive and detailed negotiations. This sum was arrived at in the following manner: I first reviewed all the items of possible cost, as outlined above, which would require an expenditure of funds in order to relocate or rebuild the affected facility, so that it would be at least as good as the old one. This included a relocation of utilities, new parking areas, new playground areas, some drainage work, new east entrance and ticket booth to the Zoo, the construction of the earth berm, and relocation of the portion of the picnic area taken, along with the construction of a new pavilion in this area.

The cost figures were arrived at after careful consideration and investigation. Outside independent sources were consulted where necessary. These costs totaled the figure mentioned above, and were approved both by the Park Commission and the Mayor and City Council, as evidenced by Exhibit "A" attached to this affidavit, being a copy of a resolution of the City Council approving the final agreement negotiated between counsel for the Park Commission and the State of Tennessee. Since that time, full payment has been received, and a deed to the required property has been delivered to the Tennessee Highway Department.

## VI

After a careful consideration of all factors, as outlined above, although I would have preferred that the route not be through the Park, it is my belief and opinion that not only have all things been done which will insure the minimizing of damage to the Park and recreation areas, but also that the practical use of all facilities now contained in the

Park or the Park itself will not be substantially affected by the expressway.

THIS, the 17th day of February, 1970.

/s/ Hal S. Lewis

Sworn to and subscribed before me, this the 17th day of February, 1970.

Notary Public

My commission expires:

July 3, 1972

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### **MEMPHIS PARK COMMISSION RESOLUTION**

BE IT RESOLVED, that the Memphis Park Commission, being aware of the pending suit in the United States District Court for the Western Division of Tennessee known as Citizens to Protect Overton Park, Inc., et al., v. John A. Volpe, Secretary, Department of Transportation, et al., Civil Action No. C-70-17, does hereby by this resolution wish to go on record in regard to the following facts:

1. That said Commission through the aid of its executive director, Hal S. Lewis, has kept abreast of all developments, designs and changes regarding the proposed expressway route through Overton Park over a period of at least several years.
2. That said Commission has received the fullest cooperation in obtaining information as well as the consideration and implementation of its suggestions from the City Engineer of the City of Memphis and the Tennessee Department of Highways and its representatives.
3. That said Commission on several occasions of more than a year ago adopted resolutions opposing the expressway going through any part of Overton Park. The governing bodies of the City of Memphis,—the Mayor and City

Council and their predecessors,—held exhaustive public hearings and concluded officially in behalf of the City of Memphis that the only feasible route for the expressway included going through Overton Park along the same general line as the public transportation right of way, which has gone through Overton Park for the past many years and has been used by buses and the public transit system. When the decision was reached by the City and announced as final, the Memphis Park Commission bent its every effort to work out a feasible plan which would inflict a minimum of damage upon the Park and the facilities in use. Through the full cooperation of the State of Tennessee, this has been accomplished. The zoo and its parking area have been relocated and reconstructed so as to be substantially as desirable and as usable as the earlier zoo location, and the work has been largely completed. The other principal facilities in the Park will be untouched and unharmed. This includes baseball diamonds, golf course, picnic grounds, Art Gallery, Art Academy, football fields, playgrounds, and playground equipment.

4. That said Commission is in full approval of the present design as being the most practical after full consideration of all factors such as safety and utility to the public as a whole, but more important to this Commission—that the design includes all possible planning to minimize harm to the park and the recreational areas contained therein.

5. That the Commission is in full approval of the agreement already consummated between the City of Memphis and the State of Tennessee whereby, in addition to the sum of \$2,000,000 which the City of Memphis has received for the land taken, an additional sum of \$209,000 was received to enable the Commission to either relocate or repair any damage or harm that might be done by the building of the expressway to the end that no facility in the park or the use thereof by the general public might be lost. That the costs of these various items was arrived at after careful consideration and should be sufficient to accomplish the ends intended.

6. That the City of Memphis and this Commission is required by law to use the above mentioned \$2,000,000 for the purchase of additional park land. To that end a 160-acre golf course and park area has already been acquired for the approximate sum of \$1,000,000. That additional park land will be purchased with the remaining \$1,000,000.

7. That the Commission has adopted a master plan for the improvement and expansion of the zoo, which contemplates the existence of the expressway under its present design, and which plan has already been implemented by the expenditure of approximately \$1,300,000 for projects recently completed or under construction with an additional expenditure in the future anticipated in the approximate amount of \$2,700,000.

8. That it is the opinion and belief of this Commission, after a careful consideration of all factors involved, that the use of the park or any of its facilities by the general public will not be substantially or materially affected by the building of the expressway under the design as now proposed.

I hereby certify that this is a true and correct copy of a Resolution duly adopted by the Memphis Park Commission on February 19, 1970.

/s/ R. R. Smyth  
Secretary

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UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF TENNESSEE

[Caption Omitted in Printing]

**AFFIDAVIT OF THOMAS E. MAXSON, CITY  
ENGINEER OF THE CITY OF MEMPHIS, FILED  
ON BEHALF OF CHARLES W. SPEIGHT, COM-  
MISSIONER, TENNESSEE DEPARTMENT OF  
HIGHWAYS**

STATE OF TENNESSEE  
COUNTY OF SHELBY

I, Thomas E. Maxson, do hereby state on oath the following facts:

I.

That I am 68 years of age and have been a resident citizen of Memphis, Shelby County, Tennessee, since 1924. That I have been employed in the City Engineer's office for a total of 45 years and have been the City Engineer since 1962. That as City Engineer it is a part of my responsibility to approve of all drainage facilities to be constructed in the City of Memphis, both public or private; and to determine, among other things, the safety or health hazards which might be resultant in any improper or impracticable construction. It is further one of the responsibilities of the department of which I am in charge to approve the design and grade of any new street constructed within this city. That in such capacity I have become familiar with the particular terrain of this geographical location, the flood conditions and the likelihood thereof, the annual rainfall, as well as other factors which would have a proper bearing on sound engineering decisions concerning the above duties.



## II.

That I am extremely familiar with the present proposed route of the expressway through Overton Park as I have participated over a number of years in numerous meetings, conferences, discussions, and public hearings on behalf of the City of Memphis. The City of Memphis through my department has cooperated fully with the Tennessee Highway Department which has, in turn, been fully cooperative. My department has assisted the Memphis Park Commission in its deliberations regarding this project and has given fully of its judgment to all involved concerning engineering problems that may be encountered with the proposed design or other proposed designs in the past.

## III.

That the drainage of the Park, especially in the Lick Creek area, has been of particular interest to me, and I have consulted frequently with representatives of the State Highway Department in this regard. Lick Creek is a natural drainage channel which now runs through the approximate center of the Park near the present southern entrance to the zoo. This creek now drains a rather large area and could cause considerable damage to the zoo and surrounding residential areas if it were obstructed during a period of heavy rainfall. At the present time, it drains naturally.

The present design of the expressway which must cross this creek provides that the creek will not be obstructed and will continue to drain naturally under the road itself in much the same fashion as now provided where it is crossed by the existing bus line. The expressway cannot be depressed any more at this point without obstructing this natural flow. The roadway will be depressed considerably below grade level at all other points as it passes through the Park.

There are several possible though, in my judgment, impracticable methods of taking care of this drainage in the

event the roadway was depressed any more at this point. All of these methods suggested have been seriously considered by both my department and the State Highway Department on many occasions, and the design now approved requiring natural drainage has been accepted by both departments as being the most practical in terms of safety and its likelihood to doing the minimum amount of harm to the Park and its recreational areas as well as the expressway and surrounding portions of the city.

Of the other methods suggested, the most common one mentioned is to build a pumping station at the site to actually pump the water as it passes under the road up the other side where it can rejoin its natural course. There is only one other such facility in this city, and its size is so small in comparison to the enormous station which would be required at Lick Creek that no real value to this inquiry can be obtained by comparing the two. Aside from the fact that constant maintenance would be required, it would be an essential requirement that an auxiliary source of power be provided for the pumps in the event of power failure. These extra facilities would have to be put somewhere which would, in all probability, require the taking of additional park land for this purpose. A reservoir has also been considered in this connection in order to reduce the size of the pumping facility, but it would require the use of a considerable amount of park land far beyond any small value that might be gained by depressing the road further at this point. It should be remembered that in spite of all precautions machinery can fail. It is self-evident that severe flooding could occur in such a case and do considerable harm to the Park and zoo, not to mention the fact that all traffic on the expressway system would be stopped. It is not inconceivable that such a situation could cause serious accidents.

As an alternative solution to mechanical pumps, it has been suggested that some form of inverted siphon be used. There is no such apparatus in use for storm drainage in the city of Memphis, and I would be very hesitant to approve

its use under any circumstances. Not only must a portion be constantly kept full of water or pumps installed to clear it after every use, but it must be kept clear of debris at all times and inspected after every rainfall. There would also be some danger in regard to such a device which, in my opinion, would not be practical in view of the large volume of water that must be carried away at this point. Any water left in the siphon would be a potential breeding place for malaria mosquitoes.

The same problems outlined above, in addition to several others, were encountered in our consideration of a tunnel for the expressway. Here again, some means other than natural drainage would have to be maintained constantly. The other problems encountered with a tunnel of this length (over 4,000 feet) concern the need for an enormous forced air ventilating system which, if inoperative, could cause fatal consequences. The tunnel would, of course, have to be illuminated and, in all probability, would have to be manned by police personnel to warn motorists of accidents and other problems which might arise in the tunnel and which could not be seen from the entrances. Though cost has not been a factor in any of my decisions, it can be seen that such a facility could only be constructed at an enormous cost to the general public. As a matter of fact, all of the above suggested alternatives could only be accomplished at considerably more cost than the proposed design, not to mention the additional constant maintenance and inspections required. It should also be added that the

construction of a tunnel facility might require the destruction of a great deal more of the large trees now in the general vicinity of the right-of-way.

/s/ Thomas E. Maxson, City Engineer  
City of Memphis

Sworn to and subscribed before me, this the 17th day of February, 1970.

Notary Public

My commission expires:

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UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF TENNESSEE

[Caption Omitted in Printing]

**AFFIDAVIT OF HENRY LOEB, MAYOR OF  
THE CITY OF MEMPHIS, FILED ON BEHALF  
OF CHARLES W. SPEIGHT, COMMISSIONER,  
TENNESSEE DEPARTMENT OF HIGHWAYS**

STATE OF TENNESSEE  
COUNTY OF SHELBY

I, Henry Loeb, do hereby make oath to the following facts:

I.

That I am 49 years of age and have been a resident citizen of Memphis, Shelby County, Tennessee, my entire life. That at the present time I am the duly elected and acting Mayor of the City of Memphis. That prior to having been

elected Mayor on this occasion, I was elected to that position for a previous term of office. That I have also served in other elected capacities in the government of the city of Memphis and was, in addition, an active serving member of the Memphis Park Commission for a number of years.

## II.

That both as a citizen of this city and in my official capacity, I have closely followed the developments over a number of years of both the selection of the general route for this section of the east-west expressway which is proposed through Overton Park, as well as the specific design of the project itself in the Park. That I have, in all my deliberations concerning this project, attempted to consider all pertinent factors such as harm to the Park and its facilities, the traffic needs of the community, the effect of alternate routes in terms of these traffic needs and the disruption of the populace and their environment; and on the whole, all things which I believed had any bearing upon the health, safety and general welfare of the people whom I represent. That in making these considerations and my final judgment, I have had the benefit of advice from all departments of the City which might be helpful as well as the fullest cooperation of the Department of Highways of the State of Tennessee.

## III.

Based upon these considerations, it is my opinion that the route now proposed is the most feasible and prudent of all the alternatives, and that all possible planning has been done to minimize harm to the Park and the recreational areas contained therein. It is further my opinion that the use of the Park or its facilities will not be substantially or materially affected by the proposed expressway.

It is further my strong feeling, made after the most careful analysis, that any further delay in the completion of this

project will do irreparable damage and harm to the proper growth and progress of this City.

/s/ Henry Loeb, Mayor  
City of Memphis

Sworn to and subscribed before me, this the 17th day of February, 1970.

Notary Public

My commission expires:

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE

[Caption Omitted in Printing]

**AFFIDAVIT OF VIRGIL A. RAWLINGS, FILED  
ON BEHALF OF CHARLES W. SPEIGHT, COM-  
MISSIONER, STATE OF TENNESSEE, DEPART-  
MENT OF HIGHWAYS**

STATE OF TENNESSEE  
COUNTY OF SHELBY

I, Virgil A. Rawlings, being first duly sworn, make oath to the following facts:

I.

I am 57 years old and a resident citizen of Memphis, Shelby County, Tennessee, having resided in said city and county my entire life. I have been an employee of the Tennessee Department of Highways in various capacities for a period of 25 years. At the present time, I hold the position of Regional Right-of-Way Engineer, and have been employed in that capacity since 1966. My duties and

responsibilities generally consist of supervising the numerous phases of work for the acquisition of all rights-of-way for the expressway system in Tennessee from the Tennessee River westwardly, although the major portion of my time is spent with the work in Shelby County. As part of my duties, it was necessary that I become familiar with that portion of Project I-40-1(90)3, which includes the proposed right-of-way through the area known as Overton Park. In addition to the familiarity and knowledge which I have acquired over a number of years in my official capacity, I have been a frequent visitor to the Park for recreational purposes. It is also a part of my responsibility to be familiar with the details of the right-of-way and parcel plans and plats. In this project, the taking through Overton Park is designated as parcel No. 307, and there is attached to this affidavit as Exhibit "A" thereto the entire parcel plat for the Overton Park acquisition. This plat has been revised a number of times, but has basically required the right-of-way shown in Exhibit "A" since 1967. There have been numerous design changes in the actual construction plans both before and since the date of Exhibit "A," but the design changes since 1967 have not required any substantial change in the taking. Exhibit "A" reflects all revisions through July 3, 1969.

The entire route for the east-west expressway of which the above numbered parcel covering Overton Park is a part is approximately 12 miles in length and runs generally from Front Street at the Mississippi River on the west to the White Station Road Interchange on the eastern edge of the city. In this right-of-way there are approximately 1687 separate parcels of real property and over 1400 of them were improved by structures of some kind such as residences, stores, or buildings of an industrial nature. As of the date of the signing of this affidavit, the State of Tennessee has already acquired either ownership or legal possession of all of said parcels with the exception of only two and approximately seven small easement areas by either negotiation or eminent domain proceedings. Furthermore, all

of the structures have been demolished or are in the process thereof. Lastly, all but a handful of the occupants of these parcels have been relocated. Some portions of this right-of-way are already under construction and in the process of completion.

## II.

As can be seen from Exhibit "A" the total area of Overton Park is approximately 357 acres. The area to be taken in fee by the State of Tennessee totals 26.4 acres. However, only 23.2 acres will comprise the area to be used for the actual right-of-way which will be access controlled. The remaining 3.2 acres will be taken primarily to enable the State to have sufficient ground to build the pedestrian overpass and bridge structure which I will explain in detail in this affidavit. A portion of this 3.2 acres will also be used to relocate small portions of park roads. There is also a 1.45 acre easement area which is to be taken for the purpose of improving drainage facilities and for slope maintenance. As can be seen on Exhibit "A" the proposed right-of-way is superimposed over facilities existing in the area taken. The nonaccess bus line now used by the Memphis Transit Authority diesel-electric buses only can clearly be seen running the entire width of the Park in an easterly direction from Parkview Street to East Parkway at its intersection with Broad Avenue. This bus route, which is similar to a two-lane paved highway, is an easement 50 feet wide which comprises approximately 4-1/2 acres of the 23.2 acres mentioned above.

At the present time, three park roads cross this bus line at grade level. The present southern entrance to the municipal zoo is approximately 250 feet east of the eastern boundary of Parkview Street and is reached by visitors who must go on foot from the parking area across the bus line. The only other entrance to the zoo for the members of the general public is at its eastern entrance and its adjacent parking facilities will not be affected by the expressway.



To accommodate the visitors who wish to enter the zoo from the southern entrance provision has been made of a pedestrian overpass. The design of this overpass has been generally left to the discretion of the Memphis Park Commission to insure that it will serve its needs and blend in aesthetically with their proposed new entranceway, the Park, and the zoo itself. It will, however, according to my understanding, based upon information and belief, be a structure sufficiently wide to permit the smooth flow of pedestrian traffic with all changes in grade to be made through ramps rather than steps. It will also have ample guard rails and other safety features to protect its users, especially small children.

During the many conferences through the years regarding the crossing of the right-of-way in other places than the pedestrian overpass, the number of such crossings, and their design have also been generally left in the discretion of the Memphis Park Commission. The present design which calls for one vehicular bridge crossing the right-of-way as shown on Exhibit "A" meets with the full approval of the Memphis Park Commission and its desires regarding its traffic flow for its eastern entrance to the zoo. It has never been the desire of the Memphis Park Commission, as I understand it, to encourage through traffic through the Park. This bridge structure will, of course, be over the expressway and both vehicular and pedestrian traffic using it will not face the present dangers existing at the bus line grade crossing. This bridge structure will have sidewalks for the pedestrians with proper guard rails.

### III.

The expressway itself will follow similar designs as now exist in the city of Memphis with opposing lanes of traffic separated by a median strip. The roadway itself will be depressed below the natural contour of existing ground westwardly from Lick Creek to McLean and eastwardly from Lick Creek to East Parkway. Only at Lick Creek will

the roadway approach grade level. The reason for this design is due to the fact that proper drainage must be provided for Lick Creek, especially during periods of heavy rainfall. Under the present design, Lick Creek and the land area of the Park which drains into it will continue to drain in its natural fashion. If the roadway were depressed any further in the Lick Creek area, drainage would have to be accomplished by a mechanical means. This would mean simply that a permanent pumping station in all probability provided with an auxiliary power source would have to be constructed and maintained. The only other known mechanical method is what is known as an inverted siphon which must be kept clear of debris at all times. In addition, for a siphon to operate properly, a portion must be kept full of liquid; in this case, water. It is self-evident that such mechanical devices create safety and health hazards. It is my understanding, based upon information and belief, that the use of both types of mechanical devices have been considered and studied by the design department of the Tennessee Highway Department and submitted to the City Engineer of the City of Memphis, who preferred and approved the present design providing for natural drainage.

The right-of-way for the controlled access portion of the taking will be completely fenced, so that no person, vehicle or animal can cross the right-of-way except at the designated places described above.

The purpose of depressing the roadway is to eliminate as much as possible any view of moving traffic to the users of the Park as well as noise from moving traffic. It is to be noted, however, that the zoo is bounded along its entire northern boundary by a major thoroughfare known as North Parkway. The Park itself, in addition to North Parkway, is bounded by two other major traffic arteries—East Parkway on the east and Poplar Avenue on the south.

## IV.

During negotiations by our department with the City of Memphis and the Memphis Park Commission, every possible suggestion was carried out to minimize any damages or harm which might be caused by the expressway to the Park or recreational areas. Additional funds were provided and have been paid to relocate a portion of the parking facilities and playground area just south of the existing southern zoo entrance, to construct an embankment known as a berm to compensate for the lack of depression in the roadway in the area of Lick Creek, for the relocation of all utilities now serving the zoo or Park, for any drainage work which may be necessitated by the expressway, and to relocate and rebuild a portion of the picnic area and pavilion now in the east portion of the Park.

It is my opinion that the utility of the Park and the zoo and all of the facilities contained therein as well as the use of the Park and said facilities by the general public will not be substantially or materially affected by the construction of this portion of the expressway system.

VIRGIL A. RAWLINGS, Regional  
Right-of-Way Engineer,  
Tennessee Highway Department

Sworn to and subscribed before me this 17th day of  
February, 1970.

Notary Public

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## AFFIDAVIT

I, Luther W. Keeler, after being duly sworn, depose and  
say:

I am sixty-four (64) years old and have been a licensed  
civil engineer for over twenty (20) years. I was State Right-  
of-Way Engineer for the Tennessee Highway Department

from 1961 to 1964 at which time I became Development Engineer for the Highway Department, a position which I hold at the present time. As State Right-of-Way Engineer, and, later Development Engineer, I am personally familiar with all of the events which occurred in arriving at the proposed location and development of the segment of the interstate project I-40-1(90)3 in Memphis, Tennessee, in the area of Overton Park, from 1961 to the present. By virtue of examining the file on this section of the project, many, many times, I am familiar with the events involved in this matter prior to 1961 to the extent of having examined all state documents, including correspondence, as are contained in this file.

Between the date 1957 and 1964, the State of Tennessee, Department of Highways, in cooperation with the City of Memphis and the United States Bureau of Public Roads, made studies for the selection of a location for the Interstate Highway System in the City of Memphis, including the location of Interstate Route 40 which runs easterly and westerly through Memphis. This route includes the section of highway proposed through Overton Park. In the determination of the location for Interstate Highway 40, the services of a consulting engineering firm, Harland Bartholomew and Associates, were employed and the consulting engineer furnished his location study report to the Department in August, 1958.

On March 14, 1961, a public hearing was held in the City of Memphis for the section of highway through Overton Park, (see affidavit of D. W. Moulton, attached hereto and marked Exhibit A).

On March 25, 1964, the Department employed the consultant engineering firm of Buchart-Horn, Inc., to prepare preliminary and final design plans for a section of Interstate Route 40 including the section through Overton Park. This employment was predicated on use of the location previously determined from studies which had been completed between 1957 and 1964. At this time, the Department considered

that the location had been adequately studied and reviewed and that these studies and reviews had shown that there is no feasible and prudent alternative to the use of the lands in Overton Park.

In mid-1964, the Department had knowledge of certain opposition which had arisen to the use of the route through Overton Park and in August, 1964, made a review of 2 alternate routes which appeared to be the most promising variations in location which would avoid use of Overton Park. These variations being considered involved only a relatively short section of Interstate Route 40, being only sufficient to avoid the park; one of these alternates being located immediately north of the park more or less along North Parkway and the other being immediately south of the park more or less along Poplar Avenue. This review substantiated justification of the routes as proposed by Harland Bartholomew and Associates and passing through Overton Park.

On July 2, 1965, representatives of the State of Tennessee, Department of Highways, of the Bureau of Public Roads, and officials of the City of Memphis, and engineers of the Consulting firm of Buchart-Horn held a conference in Memphis concerning the section of highway proposed through Overton Park, the purpose of this meeting being to consider the proposed design of the highway to the end of providing a design which would blend with the existing features of Overton Park and would minimize interference with park usage and activities.

In the Summer of 1965, because of the continued expressions of opposition to the proposed highway through Overton Park by certain citizens of Memphis, the Department of Highways and U.S. Bureau of Public Roads considered the extent of the complaints which had arisen and further reviewed the 2 previously studied alternate routes which would avoid Overton Park, and this review confirmed previous findings that the route through Overton Park was in the best public interest. This review was reported officially

to Mr. Rex M. Whitton, Federal Highway Administrator, in a letter dated August 23, 1965, from State Highway Commissioner, David M. Pack (see Exhibit "B" attached hereto).

In mid-1965, acting on instructions from the Department of Highways, the consultant engineering firm continued studies of design and minor refinements of location in the interest of reducing to the fullest extent practical any interference with park usage and in providing that the design would achieve a roadway which would blend with park topography. In September 1965, the consultant furnished to the Department a report of its further studies and recommended a minor change in the location through the park, which was adopted. This change was a small movement of the location northward, so that the proposed highway would be along, and would incorporate within the proposed highway the existing bus line which separated the zoo area of the park from the major park land areas to the south.

On December 9, 1965, Mr. Rex M. Whitton, Federal Highway Administrator, accompanied by Mr. E.H. Swick, Director of Right-of-Way and Location of the Bureau of Public Roads, visited the site of the highway through Overton Park and made a personal inspection of the proposed route and of the 2 alternate routes which had been previously studied for consideration of avoiding the use of Overton Park for the highway.

In a letter, dated January 17, 1966, addressed to Commissioner David M. Pack, Mr. Rex M. Whitton re-affirmed the previously given approval of the Bureau of Public Roads of the proposed location through Overton Park. By letter, dated June 15, 1966, to the State Highway Engineer, the Division Engineer of the Bureau of Public Roads concurred in the Department's proposal to proceed with the development of design, based on preliminary plans which had been prepared by Buchart-Horn, Inc. (see Exhibit C, attached hereto, which is a copy of Mr. Whitton's letter of 1/17/66, giving approval of the location).

In a letter, dated March 15, 1967, the Bureau of Public Roads authorized the Highway Department to proceed with appraisals, title search, and other incidentals preliminary to acquisition of rights-of-way on the section of Interstate Route 40, including Overton Park. On May 29, 1967, the Bureau of Public Roads authorized the Department to proceed with purchase of the right-of-way.

Throughout 1967, the opposition of certain citizens to the highway being proposed through Overton Park continued, and on February 14, 1968, Mr. Lowell K. Bridwell, Federal Highway Administrator, who succeeded Mr. Rex M. Whitton, came to Memphis and conducted a public meeting to discuss the location through Overton Park. On April 3, 1968, Mr. Bridwell held a further meeting in Memphis with the City Council, representatives of the Bureau of Public Roads, and the Highway Department to discuss the location and the design of the highway.

On June 20, 1968, the State Highway Department was advised that Mr. Lowell Bridwell had requested that alternate studies be made of the design through Overton Park for consideration of a lowered grade line. During the early part of 1968, the Bureau of Public Roads conducted independent reviews of the proposed design through Overton Park, and on July 31, 1968, transmitted preliminary plans showing a lowered grade line through Overton Park. On February 11, 1969, the Bureau of Public Roads provided to the Department a revised lowered grade line through Overton Park.

On March 25, 1969, the State Highway Department submitted to the Bureau of Public Roads revised drawings for the proposed highway through Overton Park showing the lowered grade line with proposed slope-wall treatment, and requested approval of the preliminary plans so that preparation of final construction plans could proceed.

On May 19, 1969, a design public hearing, as required by Federal Highway Law, was held in the City Council Chamber of Memphis City Hall.



Drawings showing the design for the construction of the highway were submitted to the Bureau of Public Roads on September 29, 1969, with a request for authorization to advertise for the construction of the highway through Overton Park. All rights-of-way required for the construction of the section of highway involving Overton Park have been acquired by the Department of Highways.

During the entire history of the development of the engineering for the location and design of the segment of highway involved here, the State Highway Department and the Bureau of Public Roads have made a sincere and prolonged effort to find a location which would avoid the use of the park lands without sacrifice of the over-all public interest. Being forced to the conclusion, after the foregoing exhaustive studies that there is no feasible and prudent alternative to the use of the lands in Overton Park, the State Highway Department and the Bureau of Public Roads have provided a design which will, to the most practical extent, minimize interference with park usage and activities, or depreciation of park values. For the design of the highway, the Department has employed a consultant engineering firm having wide experience and proven capability. This consultant firm is staffed with engineering personnel adequately trained and experienced in the field of landscaping and aesthetic design (see Exhibit "D", attached hereto, which consists of letters dated 10/5/65 and 4/27/66 from Buchart-Horn to the Department of Highways setting out the firm staffing for landscape design). The Department has, of course, utilized the services of its own landscape architect to review the plans development. All reasonable effort has been made to minimize the amount of park lands taken and it is the Department's overriding policy to continue to include all possible planning to minimize harm to Overton Park through all measures practically available to this end.

The design finally achieved lowers the grade of the proposed highway to the greatest extent practical, consistent with prudent provision of the necessary highway drainage,



this being controlled by the elevation of the natural drainage channels prevailing in the area. During the course of the design, consideration was given to an overhead roadway which would have the advantage of providing little or no severance of the total park area, but such an overhead roadway would have disadvantages from the standpoint of aesthetics and noise level.

Consideration was also given to the design of a tunnel section. Although such a design would have the advantage of eliminating many of the objections advanced by the plaintiffs in this law suit, the disadvantages attendant in all of the aspects of such a design, other than aesthetic, are tremendous. For instance, the section of the highway, which is under consideration in this proceeding, will operate with a full traffic load and if a tunnel were constructed there could be interference with the traffic flow because of vehicle accidents, breakdowns, fires or other causes which would tend to greatly depreciate the dependability of the highway. When such traffic stoppages occur in a tunnel, the difficulties in removing stalled or wrecked vehicles, or injured persons, are apparent. Tunnels of the length which would be required at Overton Park would require sophisticated ventilation and lighting equipment which add to the burden of the highway maintenance. The sag in the grade line of the highway for a tunnel would require provision of drainage. The breakdown of any of the maintenance equipment for such features as just listed would result in a most unsatisfactory or hazardous condition. A not-to-be overlooked disadvantage of a tunnel is the extremely high cost.

Because of the disadvantages already stated, the State has seldom constructed tunnels for its highways. Where tunnels have been provided, such have been due to more or less unavoidable conditions where natural topography made conventional open cut construction impractical almost to the point of being impossible. Existing highway tunnels in this State have been not more than about 1,000 feet in length and thus do not require ventilation, whereas, a tunnel for Overton Park would be approximately four times as long.

The last experience in tunnel construction by the State of Tennessee was a bored tunnel under Missionary Ridge in Chattanooga. The condition at Overton Park is favorable for a "cut and cover" tunnel, which construction would be substantially less costly than a bored tunnel. However, it is estimated that even a "cut and cover" tunnel under Overton Park would cost in excess of Thirty Million Dollars. If a tunnel were constructed it would be difficult if not impossible to provide a satisfactory connection with the existing City Street System at East Parkway where an interchange has been included in the design which has been prepared.

The estimated cost of construction of the section of highway through Overton Park as presently designed would be approximately Two and One-Half Million Dollars.

FURTHER DEPONENT SAYETH NOT.

/s/ Luther W. Keeler

STATE OF TENNESSEE  
COUNTY OF DAVIDSON

LUTHER W. KEELER, makes oath that the foregoing affidavit is true to the best of his knowledge, information and belief.

This the 19th day of February, 1970.

/s/ Edna S. Brady  
Notary Public

My Commission  
Expires: 1-28-71

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## EXHIBIT "A"

## AFFIDAVIT

I, D. W. Moulton, after being duly sworn, depose and say:

I am seventy-two (72) years old and a resident of Davidson County, Tennessee and I have been a licensed civil engineer since 1937. From January, 1959, to January, 1963, I was Commissioner of the Department of Highways of the State of Tennessee.

Having been Highway Commissioner during the period just stated, I became intimately acquainted with the situation which is involved in this legal proceeding. Among the many actions which were initiated with regard to this matter during my tenure as Commissioner of Highways, was the holding of a public hearing in connection with the location of Project I-40-1(90)3, in Shelby County in the area of Overton Park, on March 14, 1961.

While such hearings were generally conducted by the Department Attorney, in this particular instance, because of the extreme interest evidenced by the citizens of Shelby County in the location of this segment of the project, it was determined that I should conduct the hearing myself. This I did. As previously stated, the hearing took place on March 14, 1961 and lasted from 10:00 a.m., Central Standard Time until after 3:00 p.m., Central Standard Time. The hearing was schedule to be held in the County Court Room at Memphis, Tennessee and it was so commenced at 10:00 a.m. However, within a matter of minutes, it became evident that the court room was not large enough to accommodate all of those interested citizens who had come to attend the hearing.

Consequently, the hearing was adjourned and re-convened in the Municipal Auditorium. All the persons who were present at the court room when the decision to reconvene in the auditorium was made, walked the short distance from the county court room to the Municipal Auditorium. In order that no interested persons who came, late, to the

county court room to attend the hearing would miss the hearing because of its re-location, two Highway employees were stationed at the entrance to the court room until well after 11:00 a.m. to direct such persons to the new location of the hearing at the municipal auditorium.

After the hearing reconvened at the Municipal Auditorium at about 10:30 a.m. it continued without any break until well after 3:00 p.m. Present at the hearing were Mayor Henry Loeb, Mr. Rudolph Jones, Public Works Commissioner of Shelby County, Mr. Herbert Bates, State Urban Engineer of the Tennessee Highway Department, Mr. Fred Greve, Bridge Engineer, and Mr. R. S. Patton, Engineer of Design, the latter three gentlemen being officials of the Tennessee Highway Department. Attending the hearing, in addition to those last named, was Mr. William Pollard, a partner in the consulting firm of Harland, Bartholomew and Associates. Mayor Loeb, Mr. Jones, Mr. Bates and Mr. Pollard all made introductory and explanatory statements concerning the proposed design and location of the project. Also, a short film was shown which gave a visual idea of the proposed location of the project.

After the above introductory statements and film, the hearing was thrown open to questions from the audience. Every effort was made to allow any and all persons to be heard who wished to ask a question or make a statement with regard to the design or location of this segment of the project. From my personal observation, it is my opinion that everyone who wished to make a statement or ask a question did so. From the time the hearing re-convened in the auditorium, it continued without any break until after 3:00 p.m., and it was not adjourned until I had asked twice if there was any one else who wished to make any statement or ask any question with regard to the project and no reply was forthcoming.

Further this deponent sayeth.

/s/ D. W. Moulton

## EXHIBIT "B"

August 23, 1965

Mr. Rex M. Whitton  
Federal Highway Administrator  
U.S. Department of Commerce  
Washington, D.C. 20235

Dear Mr. Whitton:

Subject: Tennessee Project I-40-1(68)3, Shelby  
County - Location Through Overton  
Park in Memphis

About a year ago, this Department reviewed the selected location for Interstate Route 40 through Memphis to determine whether or not some modification of a section of the route could reasonably be made which would avoid crossing Overton Park. Some of the citizens of Memphis had voiced opposition to the routing through the Park. We are highly appreciative of the great value of large park areas within large cities and realize that we are all obligated to avoid destruction of such areas where reasonably possible. However, we must carefully view all of the involved factors in this case with an ultimate objective of preservation of the best public interest. The facts are that total area of Overton Park is approximately 340 acres and our proposed highway would use only approximately 20 acres. Therefore, it cannot be said that reduction in Park area is extreme in proportion. We do, however, propose to minimize the area of actual taking of Park land and also to minimize the disruptive effect on Overton Park through careful attention to location and design details.

Our engineering staff made projections for two alternate routes which appeared to have possibilities for avoiding the crossing of Overton Park. These are shown on Line "A" and Line "B", respectively, on a map of Memphis enclosed.

Estimates of the costs of acquisition of rights-of-way and construction on each of these alternate lines were prepared and were compared with the costs estimated for a comparable section of the original route passing through Overton Park. Our estimates showed that the total costs for rights-of-way and construction for Lines "A" and "B" and the original routing were as follows:

Line "A" - R/W and Construction	\$26,289,000
Line "B" - R/W and Construction	\$31,325,000
Original Line - R/W and Construction	\$17,141,000

Thus it was determined that for the items of right-of-way acquisition and construction the original line through Overton Park had a cost advantage of more than \$9,000,000 as compared with the least costly of the two possible alternates considered. It was obvious that it was strongly in the best public interest to continue with our selected routing through Overton Park. In further reviewing this situation at this time we have taken into consideration the comparative user benefits of the two alternate Lines "A" and "B" as compared with the line through Overton Park. We estimate a 1987 ADT of 80,000 and that Line "A" alternate would add approximately 3/10 mile to the travel distance and Line "B" would add approximately 15/100 mile as compared with the more direct line through Overton Park. Considering only the through Interstate traffic without considering interchange movements, it is noted that the annual user costs for the 3 lines being compared are as follows:

Line "A"	10,397,000
Line "B"	10,032,000
Original location through Overton Park	9,615,000

Thus it is seen that there is a substantial economic advantage in favor of our selected route through Overton Park in terms of users benefit. This annual savings to users in the amount of approximately \$780,000 would be reflected as an initial cost savings of \$8,970,000 as compared with Line "A" and an initial cost savings of \$4,780,000 as compared

with Line "B". Taking this element into consideration together with the comparative costs of right-of-way and construction would result in a total net economic advantage for the line through the Park in the amount of \$18,118,000 as compared with Line "B" and an advantage of \$18,964,000 as compared with Line "A".

In addition to the economic justification there are of course other important considerations which must be recognized in determination of a location in this case.

The route through Overton Park is favorable with respect to displacement of persons and destruction of property. We have made a survey and find that in this respect the original route compared with Lines "A" and "B" as shown in the following table:

#### Line "A"

Residential Units	771 = 3065 people
Commercial & Industrial	46 = 1300 people
Churches	3 = 75 (actually employed) 7,500 people affected
Schools	2 = 80 (actually employed) 2,000 people affected
Hospitals & Homes for Aged	1 = <u>200</u> people
Total	4720 people

#### Line "B"

Residential Units	428 = 1563 people
Commercial & Industrial	125 = 638 people
Churches	5 = 60 (actually employed) 4,000 people affected
Schools	3 = <u>125</u> (actually employed)
Total	2386 people

This route would cross the property of Southwestern University and would destroy valuable properties in the business area on Summer east of East Parkway.

Original Line Through Overton Park

Residential Units	412 =	2292 people
Commercial & Industrial	30 =	295 people
Churches	4 =	20 (actually employed)
		5,600 affected
Schools	None =	0
Total		2607 people

On both Lines "A" and "B" there would be destruction of many fine homes and attendant damages to adjacent valuable properties. These costs are reflected in the estimates for cost of right-of-way.

The route through the Park would minimize disruption of the existing street layout and traffic patterns. Overton Park is a large area without street crossings and consequently the streets adjacent to the Park have been important multi-lane arterial highways. These are as follows: North Parkway-Summer on the north; East Parkway on the East; and Poplar Avenue on the south. Each of these is a thoroughfare of long continuity. Our proposed route through the Park will span East Parkway with a diamond type Interchange and will not cross either Poplar or North Parkway. Line "A" would result in crossing and recrossing of Poplar Avenue and require an interchange in the vicinity of the intersection of East Parkway with Poplar Avenue. This situation would not be desirable. Line "B" would cross and recross North Parkway-Summer Avenue, and would cross East Parkway near the intersection of North Parkway-Summer which would be undesirable with respect to interchanging.

The facts described above have convinced us that it is strongly in the best public interest to continue with our intention to construct the highway through Overton Park. We have, however, continued efforts to minimize the taking of Park land and to minimize any possible reduction in recreation and aesthetic values of the Park. We have studied the possibility of moving the interchange originally planned at East Parkway to Hollywood in an effort to reduce taking of Park area. Our studies showed that it is



not advisable to move the interchange from East Parkway to Hollywood for the reason that an interchange at Hollywood would not conform with the existing city street plan and could not provide for traffic needs without reconstruction.

In continuation of our efforts toward the objectives stated above, we have recently been able to achieve two developments which promise to reduce the impact of the highway location on the Park. One of these is that arrangements appear to be possible which can permit shifting of our location a short distance northerly to move somewhat out of a particular wooded recreation area of the Park and to follow the right-of-way of a former street car line which already severs the Park area. The old street car right-of-way is presently in use solely by the Memphis Transit Authority for travel by street buses which have replaced the former street cars. It is indicated that it will be possible to remove the street buses and utilize the street car right-of-way as part of the width of the Interstate Highway. The advantages are obvious.

The other development mentioned is that we have determined that a diamond type interchange at the crossing of East Parkway at the eastern edge of Overton Park can replace the interchange originally planned with a consequential reduction of taking of Park land for interchange ramps. Our Consultant Engineer, employed to design the project, has been instructed to proceed to develop plans in accordance with the location along the old car line and with the diamond type interchange at East Parkway.

The grade elevation through Overton Park will be designed so as to require a minimum width of Park land. The planning will allow for shielding from view and noise by appropriate roadside planting. We will provide adequate pedestrian overpasses with careful design to conform with the Park setting as far as possible. Adequate vehicular separation structures will be provided for the Park roads.

We hope that the information and discussion herein will reassure you that our Department was correct in selecting the route through Overton Park and that your Department was correct in approving our route selection. We regret that some of the citizens of Memphis have voiced opposition to our location. We are in sympathy with their high regard for the value of the Park and recognize their sincerity of purpose. However, it is thought that in our position of responsibility to consider all facts involved we are impelled to proceed as planned. We believe that when the project has been constructed, the public will quickly recognize the great contribution of the facility in solving a major traffic problem in Memphis and will see that Overton Park has been affected only to a minor extent.

Yours truly,

/s/ David M. Pack  
Commissioner

DMP:hf

Enclosure

cc: Mr. J. C. Cobb  
Staff

[Exhibit C]

Mr. David M. Pack, Commissioner  
Tennessee Department of Highways  
State Highway Department Building  
Corner 6th Avenue, North and  
Deaderick Street  
Nashville, Tennessee 37219

Dear Mr. Pack:

THROUGH:  
Mr. Harry E. Stark  
Regional Engineer

Mr. J.C. Cobb  
Division Engineer

Thank you for your August 23, 1965 letter concerning your reevaluation of the location of Interstate Route 40 in the vicinity of Overton Park at Memphis. I appreciate the thorough manner with which your department has approached this problem. It is a matter which fully deserves the most careful and serious consideration.

Since receiving your letter I have had our staff here and in our Atlanta and Nashville offices again make a thorough and deliberate review of the whole situation, which has now been completed. I have gone over with them their findings as well as reviewed the material made available by you and others. I have also made myself and our staff available to meet with anyone who has expressed an interest and we have met with a number of people to receive their views and discuss the matter.

We find that the Tennessee Department of Highways has given adequate study and developed sufficient information to properly define the problem and on which to base a decision. We find nothing pertinent to this matter which you have not taken into consideration. Your conclusion that the location through the northern part of Overton Park represents the proper balance of the various factors involved in this area is well founded. We can offer no objections to your decision and reaffirm our previous approval of this location.

I have noted with special interest your remarks concerning the design of the highway through the Park area, particularly the aesthetic aspects. I strongly indorse the most exacting efforts to assure a finished product which is in keeping with the area and future Park usage. We consider this to be absolutely essential and for added emphasis make it a condition to our action. We ask that the design be subjected to continuous evaluation by qualified architectural landscape personnel as it progresses. The aesthetic elements should be fully coordinated with the appropriate city park officials so that a mutually acceptable plan is achieved.

Sincerely yours,

/s/ Rex M. Whitton  
Federal Highway Administrator

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## [Exhibit D]

September 2, 1965

Mr. John C. Cobb  
Division Engineer  
Bureau of Public Roads  
Nashville, Tennessee

Dear Mr. Cobb:

Subject: Project I-40-1(68)3, Shelby County--Location  
in Vicinity of Overton Park

In your letter of April 14, 1965, addressed to Mr. W. E. Dunlap, you requested 3 copies of maps and other supporting data in connection with cost estimates furnished in a letter from Mr. L. T. Cantrell to Commissioner David M. Pack dated August 28, 1964. In recent weeks you and members of your engineering staff have reviewed with us the data in our office which were used to arrive at the figures given in Mr. Cantrell's letter. On August 23, 1965, Commissioner Pack addressed a letter to Mr. Rex Whitton of the U.S. Bureau of Public Roads in Washington which summarized our studies of the location of Interstate Route 40 in the vicinity of Overton Park. This letter incorporated the figures given in Mr. Cantrell's letter of August 28, 1964, except that the totals omitted the E&C increments which had been included in the totals in Mr. Cantrell's letter. Also, Commissioner Pack's letter included consideration of user benefits in arriving at a higher estimate of the economic advantages of the original route through Overton Park as compared with Alternate Lines "A" and "B". These alternate routes would miss Overton Park to the south or to the north.

In our present review of these estimates we have discovered that the estimates made and reported in Mr. Cantrell's letter of August 28, 1964, and in Commissioner Pack's recent letter to Mr. Whitton were not based on exactly comparable lengths of the three lines on which estimates

were furnished. This was due to failure to use a common beginning point for the routes being compared. The difference in beginning points was small and no significant amounts of cost were involved insofar as these comparative estimates are concerned. However, in order to properly document our records we have made adjustments to the cost estimates for the 3 lines being compared and the final adjusted estimate figures are given below for your records in tabulated form.

	1964 Estimates—(Uneven Beginning Points)		1965 Adjusted Estimates Garland to Holmes (For Common Beginning Point)		
	ROW	*CONST.	ROW	*CONST.	ROW & CONST.
Original Line Through Park	9,042,000	8,099,000	9,641,000	8,510,000	18,151,000
Line "A"	18,000,000	8,289,000	17,814,000	9,461,220	27,275,220
Line "B"	23,350,000	7,975,000	23,350,000	9,139,320	32,489,320

\*Not including E&C increments which were included in Mr. Cantrell's letter of August 28, 1964.

Comparing the figures in the last column above with the figures given in Commissioner Pack's letter of August 23, 1965, we note that after adjusting for a common beginning point we have some higher costs for both Line "A" and the original route through the Park. These increases are practically equal however and do not affect our statement of conclusion that "for the items of right-of-way and construction the original line through Overton Park had a cost advantage of more than \$9,000,000 as compared with the least costly of the two possible alternates considered."

We are attaching hereto one copy of the following:

- A. The report and estimate of cost of rights-of-way on Lines "A" and "B" in pamphlet form.
- B. The sheets taken from the 104(b)5 study which are the basis of the right-of-way costs for the line through Overton Park.
- C. The computations made to determine the cost of construction on the lines being compared.

These show the original basis used in 1964 figures and also the figures as adjusted in 1965 to reflect a common point of beginning.

As you know, we used large aerial photographs to project the locations of the Lines "A" and "B" for purposes of this study. These are on file in our offices for your use as needed. We will, however, within the next few days supply you with reduced size copies of these photographs for your records. Please advise if anything further is needed in connection with this study.

Yours truly,

L.W. Keeler  
Development Engineer

LWK:hf

Enclosures

cc: Com. David M. Pack; Staff  
Mr. L.M. Bare; Mr. R.S. Patton  
Mr. J.K. Bilbrey; Mr. C.E. Greek

October 5, 1965

Mr. H. O. Boyd  
Special Projects Engineer  
Tennessee Dept. of Highways  
Nashville, Tennessee

Dear Mr. Boyd:

In our recent meetings with the State and Bureau of Public Roads representatives, there have been discussions of developing landscaping on portions of I-40 in Memphis. The idea was also expressed that it would be desirable to have the design consultant on the project do this landscaping.

We want to appraise you of the fact that our firm has this capability and experience. Mr. Carl Gudat, head of our Planning Division, has extensive experience in landscape design and the many different types of flowers and shrubbery. He was landscape engineer for nine years with the U.S. Department of Interior, National Park Service, on the Natchez Trace Parkway doing about 600 miles of planning and development of this parkway through Virginia, Tennessee, Alabama and Mississippi. Mr. Gudat is known by Mr. McSween, Director of Conservation in Tennessee, and others in the Parks Department.

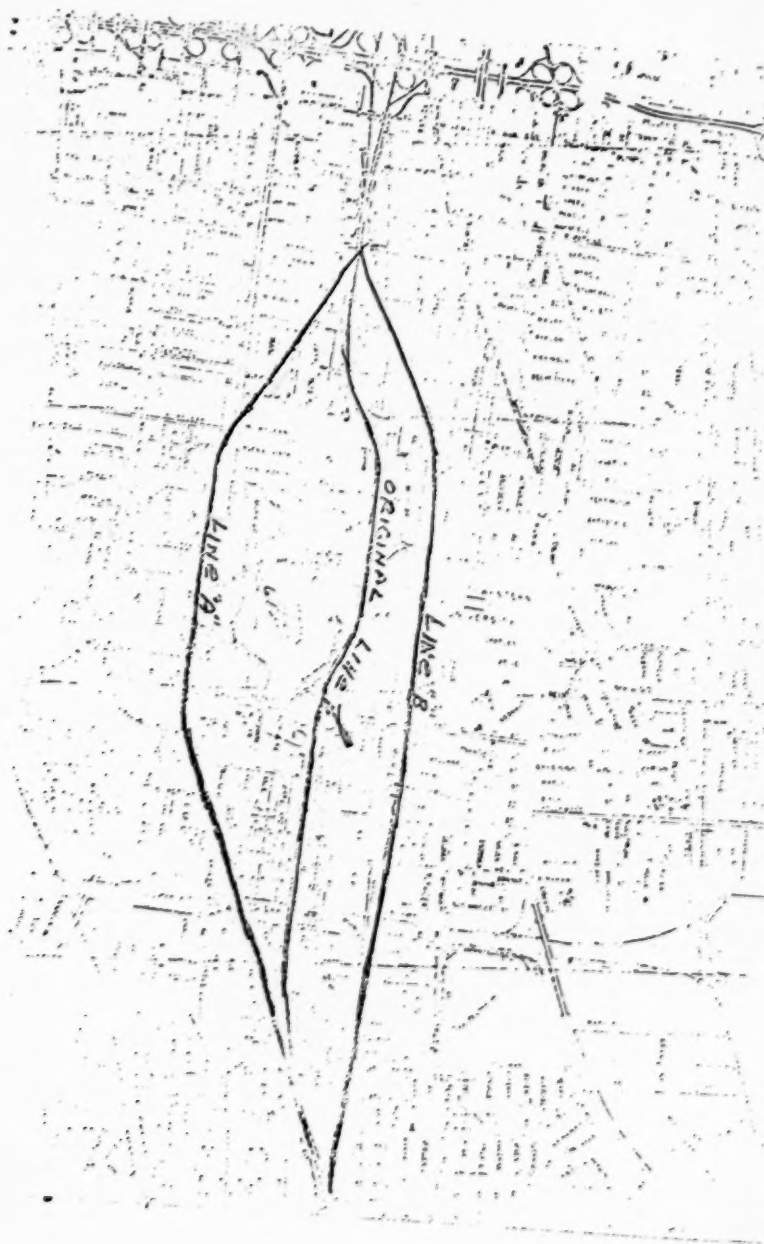
We request your consideration of our firm for the landscaping on the referenced project.

Very truly yours,  
BUCHART-HORN

/s/ Paul Seiler, P.E.  
Vice-President

PS/bjm

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# ESTIMATED CONSTRUCTION & R/W COST FROM GARLAND TO HOLMES STREET

<u>Line</u>	<u>Length</u>	<u>Est. Presented by SHD 8-23-65</u>	<u>SHD Updated Est. 9-2-65</u>
A	3.80	\$26,289,000	\$27,275,000
B	3.65	\$31,325,000	\$32,489,000
Approved	3.50	\$17,141,000	\$18,151,000

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<u>Line</u>	<u>Length</u>	<u>Estimate Based on SHD Updated Est. of 9-2-65</u>
North Park Zoo	3.60	\$19,322,000*

- \* This estimated cost was prepared by adjusting the State's updated estimate of 9-2-65 for the approved line. The adjustment was made to reflect additional right-of-way and construction costs shown in Buchar-Horn's Route location Study—Overton Park Area. This total estimated cost includes the estimated market value in place of the Zoo improvements (\$160,000). *It does not include cost of relocating the Zoo.*

The estimated cost figures presented by the State on August 23, 1965, have been previously furnished to Mr. Bridwell. The State adjusted these figures upward on September 2, 1965, to correct an error found in the approved location estimate and to reflect an increase in construction cost for all lines. As indicated, all lines increased the same approximately (\$1,000,000), therefore, relatively speaking, there was no change for comparative purposes.

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UNITED STATES DISTRICT COURT,  
WESTERN DISTRICT OF TENNESSEE

[Caption omitted in printing]

**MOTION TO DISMISS ON BEHALF OF DEFENDANT,  
CHARLES W. SPEIGHT, COMMISSIONER,  
DEPARTMENT OF HIGHWAYS**

Comes now your defendant, by and through his attorney, David N. Pack, Attorney General of the State of Tennessee, and J. Alan Hanover, special counsel, and respectfully joins the defendant, John A. Volpe, Secretary, Department of Transportation of the United States, in moving to dismiss the cause as expressed in the amended complaint heretofore filed by plaintiffs, for the reasons stated in said motion of the defendant, Volpe, filed on January 2, 1970, and incorporated herein as part of this motion, and the affidavit and attachments filed therewith. In addition thereto, this defendant incorporates as part of this motion and in opposition to plaintiffs' motion for preliminary injunctive relief, affidavits of the following persons:

Thomas E. Maxson, City Engineer, City of Memphis

Hal S. Lewis, Executive Director, Memphis Park Commission

Henry Loeb, Mayor, City of Memphis

Virgil A. Rawlings, Regional Right-of-Way Engineer, Tennessee Department of Highways

William S. Pollard, Jr., Partner, Harland Bartholomew & Associates

D. W. Moulton, Former Commissioner, Tennessee Department of Highways

Henry K. Buckner, Jr., Department Attorney, Tennessee Department of Highways

Luther W. Keeler, Development Engineer, Tennessee Department of Highways.

As a further ground for said motion to dismiss against the plaintiffs, Mrs. Sunshine K. Snyder and William W. Deupree, your defendant would point out to the Court that said plaintiffs allege that they have standing to sue as property owners near the proposed right-of-way whose property is, or is about to be, damaged. Such a cause of action, if facts exist to support same, is provided for by the "Inverse Condemnation Statute" of the state of Tennessee, known as § 23-1423 of the Tennessee Code Annotated, which gives said plaintiffs an adequate remedy under the law of the state of Tennessee.

DAVID N. PACK  
Attorney General, State of  
Tennessee

By Lurton C. Goodpasture,  
Assistant Attorney General

HANOVER, HANOVER,  
HANOVER, WALSH &  
BARNES  
Special Counsel  
By J. Alan Hanover

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IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

[Caption omitted in printing]

**AFFIDAVIT OF DON NEWMAN**

Don Newman, being first duly sworn, deposes and says:

That he is a Commercial Photographer with offices in Memphis, Tennessee, and has been for many years;

That on February 18, 1970, at the request of United States Attorney Thomas F. Turley, Jr., he made from an

altitude of approximately 1500 feet the sixteen (16) photographs, numbered 1 through 16 with the date stamped on each, which are attached and made a part hereof; that those photographs numbered 1 through 14 show, sequentially, beginning at I-240 and proceeding westwardly, to the new bridge being built across the Mississippi River, the situation of the right-of-way and construction on I-40, in Memphis, Tennessee; that No. 15 shows the northern portion of Overton Park looking eastwardly and No. 16 shows the western end of the right-of-way with the piers of the new bridge across the Mississippi River visible in the background.

Further deponeth saith not.

/s/ Don Newman

Subscribed and sworn to before me this February 19, 1970.

W. LLOYD JOHNSON,  
CLERK

By \_\_\_\_\_  
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

[Caption omitted in printing]

**MOTION FOR SUMMARY JUDGMENT ON BEHALF  
OF DEFENDANT JOHN A. VOLPE, ETC.**

Defendant John A. Volpe, United States Secretary of Transportation, moves the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in his favor dismissing the "Complaint", as amended, of Citizens To Preserve Overton Park, Inc., et al., on the ground that there is no genuine issue as to any

material fact and that the defendant is entitled to such judgment as a matter of law.

This motion is based upon:

1. The pleadings on file.
2. The affidavits heretofore filed herein.

/s/ Thomas F. Turley, Jr.  
 United States Attorney –  
 Western District of Tennessee  
 Attorney for Defendant  
 John A. Volpe

SERVED by delivering a copy hereof to attorneys of record for plaintiffs, this February 20, 1970.

/s/ Thomas F. Turley, Jr.  
 Attorney for Defendant Volpe

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IN THE UNITED STATES DISTRICT COURT FOR THE  
 WESTERN DISTRICT OF TENNESSEE  
 WESTERN DIVISION

[Caption omitted in printing]

[37] First of all, with reference to the standing to sue of the plaintiffs insofar as the State of Tennessee is concerned. Number one, I do feel that the plaintiffs would have standing to sue against the State of Tennessee if they had raised some substantial constitutional issue. They have not done so. However, on the other side of the coin, the State of Tennessee is not asking this Court to permit it to withdraw, nor are we shrinking from the duty we feel we have to present the State's position in this case to the Court.

THE COURT: Well, actually, you intervened.

MR. HANOVER: Well, we intervened, Your Honor, at the suggestion of the District Judge in Washington, I believe

Judge Jones, and I am not at this time changing that position. Our purpose in being here, however, Your Honor, is [38] that we have an investment to protect. Specifically, an investment of some two million two hundred thousand dollars, which has already been paid to the City of Memphis and the Memphis Park Commission, and the great portion of which I think they have already spent or provided to spend. In addition to the balance of the route, which Mr. Turley has mentioned to us, which runs from White Station Interchange to the bridge. Our position, however, with reference to certain allegations, which we don't think have any place in this lawsuit, as to the allegations of the plaintiffs, Mrs. Snyder and Mr. Deupree—possibly I have misinterpreted their statements. I think they state as individuals that they have standing to sue because their property will be damaged by this taking.

THE COURT: I think Mrs. Snyder alleged that. She alleged she lived about fifteen hundred feet from the expressway on Kenilworth.

\* \* \* \* \*

[115] THE COURT: Now, I indicated earlier, and I will be glad to hear you on this point, but I indicated earlier that I think the most that we could ever get into the merits of this case would be a determination as to whether or not the [116] Secretary had acted arbitrarily or capriciously in making this determination, and in no event would we ever be at liberty to review it as an original matter on the preponderance of the evidence. Do you agree the arbitrary and capricious test is the only one we could apply here?

MR. VARDAMAN: I think there are two tests that ought to be applied. The first ought to be whether he made an attempt to comply with the law—whether he made any finding there was compliance with the law.

THE COURT: That's a procedural point. We are talking about merits now.

MR. VARDAMAN: I think at that point the question would be whether in approving—I suppose it gets down to arbitrary or capricious.

THE COURT: That's what the cases say—that although we have some power of review of the administrative determination pursuant to the Administrative Procedure Act, our review is limited to the determination as to whether or not the Executive Department official acted arbitrarily and capriciously. Now, you didn't allege in your [117] complaint that he did act arbitrarily and capriciously. You just allege that there was indeed another route which was feasible and prudent.

MR. VARDAMAN: We say he has never complied with the statute. I say after he has come in and—after we have to prove that he hasn't attempted, has made no findings that the statute has been complied with and the evidence doesn't support that he has made any findings, he doesn't even come in and tell you that he has made any findings, we are entitled to an injunction until he goes through the mental process of deciding whether that statute has been complied with, and I think that's quite important here, because that statute requires a type of planning and a type of consideration designed to preserve parks such as Overton Park, and it hasn't been done in this case, and I can prove to you that it hasn't been done in this case.

THE COURT: Do you contend that it was an arbitrary and capricious decision on the merits?

MR. VARDAMAN: No. I don't contend that he never made any finding that there were no [118] feasible or prudent alternatives.

THE COURT: Well, let's assume, to get to the point then, let's assume that the law does not require that he actually write down and file somewhere a determination—yes, I find this to be the only feasible and prudent route. So we are past that point. Do you say it would be then an arbitrary and capricious decision as opposed to the other options?

MR. VARDAMAN: Yes, sir, I would.

THE COURT: You would?

MR. VARDAMAN: Yes, sir.

THE COURT: Well, you didn't allege that in your complaint.

MR. VARDAMAN: I didn't think that was necessary, at least at this point. I think it states a cause of action if we allege that he never made such a finding. The statute reads also that he shall not approve it if there are prudent and feasible alternatives. We have alleged, in the terms of the statute at least, that there are prudent and feasible alternatives.

THE COURT: Yes; and I gathered—I got [119] the impression from reading the complaint and also your briefs that you consider that you had a right to a trial de novo in this Court as to the issue as to whether or not there was a prudent and feasible alternative.

MR. VARDAMAN: I think that any proceeding of this sort is a review of his decision. I don't think it's settled under the statute. I agree with you that in most cases of this sort it is not a de novo decision. But the decision upon review is not, I submit, simply the decision to build a highway, but it's a decision in the terms of the statute of whether there are alternatives or the review of his decision with respect to design. If he never made those decisions, then we maintain that under that law we are entitled to an injunction until such time as he does, and I think that we have set forth in the terms that we have submitted—

THE COURT: (Interposing) On what do you base your statement that he did not make the decision, because there is nothing in writing that you know about that says, "I find this to [120] be true."?

MR. VARDAMAN: Because Mr. Bridwell, who had responsibility as administrator of making that decision in the first instance—Mr. Bridwell told Congress, "I left it up to the City. I didn't make the decision as to whether these were prudent or feasible."

THE COURT: That is not to say though that the Secretary didn't agree with the City's determination, is it?

MR. VARDAMAN: That's right. But I will offer to prove to this Court by Mr. Bridwell's deposition, which they have objected to my taking so far, that he never made such a finding. It's in his Congressional testimony. I think



it is implicit in his statements that he said, "Yes, there are alternatives, and I offered them, and I let the City decide."

\* \* \* \* \*

[128] THE COURT: Again, we would be applying the arbitrary and capricious test, wouldn't we, to what he determined?

MR. VARDAMAN: If you find that he made a determination that these are impossible.

THE COURT: So the Court somewhere along the line, to give you any relief, would have to say it was arbitrary and capricious not to dig or bore a tunnel, or it was arbitrary and capricious [129] not to have a cut and fill tunnel or it was arbitrary and capricious not to have a partially covered tunnel, or not to have a siphon?

MR. VARDAMAN: I think if you had these public officials after their study saying it is impossible to do this, then we would have the issue of whether it was arbitrary and capricious. But I submit to you now there has been no such finding. They haven't attempted to evaluate these possibilities in the terms of this statute. They have planned it as if the statute weren't on the books. They have never considered whether these were possible. But I think once we get beyond that, I think I can show clearly that it was arbitrary and capricious to find that these devices are impossible, with due respect to Mr. Maxon, in this day and age when men are going to the moon and highways of this sort are being built, and if little Lick Creek can't be put under this, I am way off base.

THE COURT: Well, he says it can be done.

MR. VARDAMAN: That's right, and even for this one he doesn't say it is too expensive.

\* \* \* \* \*

[132] THE COURT: Mr. Vardaman, do you see any constitutional issue in this case? If so, what is it?

MR. VARDAMAN: I think if the decisions are arbitrary and capricious, that's also generally to violate due process.

THE COURT: I believe somewhere in our original complaint, and I think also in the amended complaint you allege

deprivation of the Fifth and maybe the Fourteenth Amendments.

MR. VARDAMAN: We haven't developed that, and I am not pushing that.

THE COURT: Certainly as far as the State and City are concerned it was just a sale of land. The City owned the land, and through its duly constituted authorities sold it to the State in a negotiated deal.

MR. VARDAMAN: That's right.

THE COURT: So the only peg that you can possibly hang your hat on is by getting at the Secretary either through a procedural error or through the proposition that he was arbitrary and capricious so far as the substance of the matter [133] is concerned, right?

MR. VARDAMAN: That's correct.

THE COURT: Because absent these provisions in Title 23, you wouldn't have any basis to complain, would you, or these good folks who are complaining, because the State of Tennessee can buy land from the City—

MR. VARDAMAN: (Interposing) That's right. The State of Tennessee under the laws we are relying on they could build it right through there if they wanted to pay a hundred percent.

THE COURT: Suppose the State of Tennessee paid for the whole part that goes through the park, and then asked for the ninety percent from the "Feds" on that? Where would you be?

MR. VARDAMAN: You mean ninety percent for the other two sides?

THE COURT: Suppose they said all right, we won't ask for the ninety percent on the park, but the rest of it.

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IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

[Caption omitted in printing]

**MEMORANDUM DECISION AND JUDGMENT**

This is an action to enjoin the Secretary of Transportation from releasing federal funds to the Highway Department of the State of Tennessee for construction of a segment of an expressway in the City of Memphis through Overton Park, which is a municipally owned and operated park used for a zoo and other recreational purposes. Plaintiffs Deupree and Snyder are residents, property owners and taxpayers in the City of Memphis; plaintiff Citizens To Preserve Overton Park, Inc., is a non-profit corporation organized and operated by Memphians for the purpose indicated by its name; plaintiffs Sierra Club and National Audubon Society, Inc. are non-profit corporations organized and operated to promote conservation. Defendant John A. Volpe is Secretary of Transportation and defendant Charles W. Speight is Commissioner of the Tennessee Department of Highways.

This action was filed in the District Court of the District of Columbia against defendant Volpe alone; thereafter, upon argument of his motion to dismiss and before decision thereon, that Court transferred the cause to this court in order that defendant Speight could be joined as such. This has since been done.

This court then set for hearing on February 20, 1970 both plaintiffs' motion for a temporary injunction and defendant Volpe's motion to dismiss. Defendant Volpe, prior to the hearing, also filed a motion for summary judgment, in which defendant Speight joined at the hearing, and this motion, rather than the motion to dismiss, was argued at the hearing. The motions for summary judgment and the motion for a temporary injunction are based on a large number of affidavits, including exhibits thereto, and not

only have we studied such affidavits and exhibits but also we have had the benefit of extensive argument.

Plaintiffs contend that the Secretary's final formal approval in November, 1969 of the involved project (which approval is necessary before the federal funds to be contributed, amounting to 90% of the total cost, can be released) is void because he did not follow procedures prescribed by statute and by regulation issued by the Bureau of Public Roads. They further contend that such approval is void because his determination, as required by statute, that this is the only feasible and prudent corridor for the expressway and his determination, as also required by statute, that all possible design safeguards have been taken to protect the park are arbitrary and capricious determinations.

Defendants contend that plaintiffs do not have standing to maintain this action, which contention we can forthwith overrule at least as to plaintiff Citizens To Preserve Overton Park. This organization through its officers and members has actively participated for some years in administrative proceedings for selection of the corridor and design of the expressway. *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179 (6th Cir. 1967) and *South Hill Neighborhood Assoc., Inc. et al. v. Romney, et al.*, \_\_\_\_\_ F.2d \_\_\_\_\_ (6th Cir. decided November 24, 1969).

Defendants also contend that the record shows without dispute: (1) that the prescribed procedures were complied with; (2) that, even if there was a deviation from prescribed procedures, there was substantial compliance with them; (3) that any deviations from such procedures were harmless errors; (4) that if there was any deviation, such was a deviation only from the procedures prescribed by the Bureau of Public Roads in a Policy and Procedure Memorandum, which need not be followed as would a regulation; and (5) that the prescribed procedures upon which plaintiffs rely did not apply to the selection of the corridor for the expressway since such selection had been made prior to the promulgation of the procedures. Defendants, finally,

deny that defendant Volpe's approval of this project, either as to corridor or design, was arbitrary and capricious.

We deal first with plaintiffs' contention that the Secretary's approval is void because of procedural defects in the administrative proceedings.

With respect to their contention that statutory and regulatory procedures were not complied with, plaintiffs rely on 23 U.S.C. § 128, which provides in part:

"(a) Any State highway department which submits plans for a Federal-aid highway project . . . going through any city . . . shall certify to the Secretary that it has had public hearings . . . and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community . . . .

(b) When hearings have been held under subsection (a), the State highway department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification."

In this connection, plaintiffs further rely on Policy and Procedure Memorandum 20-8 of the Bureau of Public Roads, which is Appendix A to Title 23 C.F.R., Chapter 1, Part 1. The relevant provisions are as follows:

"§ 8 Public hearing procedures.

\* \* \*

(b) Conduct of public hearing.

\* \* \*

(2) Provision shall be made for submission of written statements and other exhibits in place of, or in addition to, oral statements at a public hearing. The procedure for such submission shall be described in the notice of public hearing and at the public hearing . . . ."

\* \* \*

## (e) Transcript.

- (1) The State highway department shall provide for the making of a verbatim written transcript of the oral proceedings at each public hearing. It shall submit a copy of the transcript to the division engineer within a reasonable period . . . after the public hearing . . . ."

Section 10 of Policy and Procedure Memorandum 20-8 further provides that the corridor and design of an expressway will not be approved until the requirements of the Memorandum have been complied with.

It is undisputed that the notice of the May, 1969 hearing which was run in a local newspaper did not indicate that written statements could be submitted at the hearing. It is also undisputed that the equipment which was set up at the hearing for transcribing the proceedings malfunctioned so that some of the statements at the hearing were not included in the transcript that was sent to the Bureau of Public Roads. It is plaintiffs' contention that, with such defects in the notice and in the transcription, there was a déviation from the prescribed procedures and that therefore the approval of the project is void. It is, on the other hand, undisputed that all who appeared and whose oral statements were not transcribed were advised by certified mail that they could file a statement, that several of them did file such statements, and that a total of about forty statements were filed after the hearing. Further, plaintiffs have not even alleged, let alone shown by affidavit or otherwise, that there were persons who desired to make a statement but who did not do so because of lack of notice, or that there was any fact, argument, theory or position in support of another location or in support of another design which had not been, or at the hearing was not advanced to the state and federal authorities.

We recognize the requirement that an administrative agency follow its own procedural regulations. *Vitarelli v. Seaton*, 359 U.S. 535 (1959). We further assume that the

involved Policy and Procedure Memorandum should, for this purpose, be treated as a regulation. While doing so, however, we might say that we have considerable doubt that the Policy and Procedure Memorandum was intended to have the effect of a regulation. The preface to this Memorandum explicitly states that it was not being issued as a new part to the Bureau's regulations and was being made an Appendix to Part 1 to obtain for it the broadest distribution. This Memorandum is not included in the Code of Federal Regulations.

This Court has jurisdiction under 5 U.S.C. § 706 to determine whether the Secretary's approval is void because of procedural defects. This statute provides in part that agency action may be set aside if it is done "without observance of procedure required by law." However, a proviso to all of Section 706 is that the court shall view the whole record and take due account of the rule of prejudicial error. If a procedural error is harmless, the court is without authority to set aside an administrative determination.

At the outset it should be said that the May, 1969 hearing here attacked by plaintiffs, was only a design hearing rather than a corridor hearing, though the notice indicated it was to deal with both location and design. That this was only a design hearing was made completely clear at the hearing, and indeed the corridor had long since been approved and much of the right-of-way had been acquired prior to this design hearing. Accordingly, a corridor hearing was not required at that time (PPM 20-8 § 6(d)), and any defect in the procedure then could only affect the approval of the design.

Plaintiffs did not, at argument, seriously press the failure to obtain a full transcript of the May, 1969 hearing as a basis for the injunction sought here. Apparently they concluded that the offering of the opportunity to file written

statements later constituted a substantial compliance, with which we agree.<sup>1</sup>

With respect to the failure of the newspaper notice to advise of the right to submit written statements, we believe that the undisputed facts show that there was substantial compliance with the regulation requiring such notice in that so many interested persons, including members of Citizens To Preserve Overton Park, were advised by mail of the right to file such statements and in that so many such statements were received after the hearing. After all, the whole purpose of the provision for filing such statements is to get all points of view before the Bureau and the Secretary and the undisputed facts show that this was accomplished.

We also conclude that, to the extent that the transcript and notice provisions were not literally complied with, on the undisputed facts this was harmless error. As we noted before, plaintiffs have not even alleged, let alone shown by affidavit or otherwise, that there were persons who desired to make a statement but who did not do so because of lack of notice, or that there was a fact, argument, theory or position in support of another design which had not been, or at the hearing was not advanced to the state and federal authorities. Further, we note that the corridor hearing in 1961 and the design hearing in 1969 were well attended and that interested persons who were fully prepared expressed objections and described alternatives to both the corridor and the design. Accordingly, the defendants are entitled to summary judgment on these issues.

Plaintiffs next rely on 23 U.S.C. § 138 which provides in part:

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<sup>1</sup> It should be noted that the statute (23 U.S.C. § 128(b) only requires that "a copy of the transcript" be submitted and PPM 20-8 requires only that the "State highway department provide for the making of a verbatim written transcript . . ." and that a transcript be furnished. It is arguable that a verbatim transcript has been *provided for* even if not accomplished.



"§ 138. *Preservation of parklands.* It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands . . . . \* \* \* \* [T]he Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park . . . of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area . . . resulting from such use."

The same provision is contained in 49 U.S.C. § 1653(f).

Plaintiffs contend that such statute requires that the Secretary publicly articulate an explicit finding that there is "no feasible and prudent alternative" and that "such program includes all possible planning to minimize harm to such park." It is undisputed that the Secretary did not make such a finding but there is no such requirement in the statute, and in the absence of such requirement we will not imply one.

More seriously, plaintiffs contend that the determinations by the Secretary, in approving the project, that there were no feasible and prudent alternatives and that all possible planning had been included to minimize harm to the park were arbitrary and capricious determinations. It is clear that we have jurisdiction to entertain this contention. 5 U.S.C. § 706; *Road Review League, Town of Bedford v. Boyd*, 270 F.Supp. 650 (S.D. N.Y. 1967).

The legislative history of the amendment to §§ 138 and 1653(f) makes it clear that it was not the intent of Congress to prohibit the building of an expressway through a park if there was *any* alternative; rather, by providing that such should not be done if there is any feasible and prudent alternative, it was the intent of Congress to avoid the park if, after considering all relevant factors, it is preferable to do so. In short, it appears to have been the intent

of Congress to point up the wisdom of conserving park lands and the lack of wisdom in routing an expressway through a park because the land is cheaper and the construction is easier. As stated in Report of House Managers (U.S. Code Cong. & Adm. News, 90th Cong., 2d Session, 1968, p. 3538):

"This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that, clearly enunciated local preferences should be overruled on the basis of this authority [Appendix I]."

With respect to the reference to the "clearly enunciated local preferences" in the foregoing statement, it should here be pointed out that the Mayor and Council of the City of Memphis have heretofore approved this corridor and design and have approved the sale of this strip through Overton Park to the State of Tennessee for \$2,209,000. The land has been conveyed and paid for. Of this amount, \$1,000,000 has already been spent for a 160 acre golf course; \$209,000 will be spent on the zoo; and the balance of \$1,000,000 must by law be expended to acquire other park land. Also, the Memphis Park Commission, which had disapproved of the corridor, acquiesced after it was approved by the Mayor and Council and the Commission has approved the design as being the best one for the park. Since § 138 by its terms is invoked only if the park "is of local significance as determined by Federal, State or local officials having jurisdiction thereof," in view of the approval by the Mayor and Council, it may well be that § 138 simply has no application here.

The affidavits show without dispute, in addition to the foregoing, that the corridor and design have been under

official and public discussion for many years; that the corridor chosen as the only feasible and prudent one was determined to be such by the federal, state and city authorities and by Harland Bartholomew and Associates, a private consulting firm which has handled the city planning of Memphis since 1924; that the design has been approved by federal, state and local authorities as being the most practicable design to protect the park and zoo in all respects and that the Park Commission is of the opinion that, with such design, the park and zoo will not be functionally impaired.<sup>2</sup> All of the property along the proposed corridor has been condemned, most of the buildings within the expressway path have been destroyed, and the persons and businesses affected have been relocated. It is completely clear that, with respect to corridor and design, those who made the decisions did not confine their considerations to cost and engineering problems but rather considered all factors including the intangible values in a park and zoo.

We recognize that normally a motion for summary judgment should not be granted if it is made properly to appear that a determinative fact is in dispute. Here, however, we would not, at a plenary hearing, have for determination whether there is a feasible and prudent alternative to the corridor or whether there is a reasonable alternative to the design that would protect the park more. These are determinations to be made by the Secretary of Transportation, and he has decided that no such alternatives exist. We could be concerned with the question and only the question of whether or not the determinations as made were arbitrary and capricious. Our study of the affidavits and exhibits on file convince us that, from the undisputed facts, we could

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<sup>2</sup> Although the statute requires that all "possible" planning be done to minimize harm to the park, plaintiffs conceded at argument that a rule of reason is applicable here. However, they urged that it would not be unreasonable to expend an extra 107 million dollars for a bored tunnel if such would be at all advantageous to the park.

never find in this case that, as contended by plaintiffs, such determinations are so wrong as to be arbitrary and capricious. This being so, we conclude that defendants are entitled to summary judgment on this issue as well as the other issues in the case.

It is therefore ORDERED that the motion of plaintiffs for a temporary injunction be denied and that the motion of defendants for summary judgment be granted and the action is dismissed.

ENTER this 26th day of February, 1970.

/s/ CHIEF JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

[Caption omitted in printing]

### NOTICE OF APPEAL

Notice is hereby given that Citizens to Preserve Overton Park, Inc., William W. Duepree, Sr., and Sunshine K. Snyder, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Memorandum Decision and Judgment entered in this action on 26th day of February, 1970, and from the orders set forth therein denying the plaintiffs' motion for a preliminary injunction.

tion and granting the defendants' motion for summary judgment and dismissing the action.

/s/ John W. Vardaman, Jr.

Wilmer, Cutler & Pickering  
900 17th Street, N.W.  
Washington, D.C. 20006

/s/ Charles Forrest Newman

Burch, Porter & Johnson  
Court Square Building  
128 North Court Avenue  
Memphis, Tennessee 38103

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IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

[Caption omitted in printing]

### NOTICE OF APPEAL

Notice is hereby given that Sierra Club and National Audubon Society, Inc., plaintiffs above named, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Memorandum Decision and Judgment entered in this action on the 26th day of February, 1970, and from the orders set forth therein denying the plaintiffs'

motion for a preliminary injunction and granting the defendants' motion for summary judgment and dismissing the action.

/s/ John W. Vardaman, Jr.  
Wilmer, Cutler & Pickering  
900 17th Street, N.W.  
Washington, D.C. 20006

/s/ Charles F. Newman  
Burch, Porter & Johnson  
Court Square Building  
128 North Court Avenue  
Memphis, Tennessee 38103

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Nos. 20344 and 20345

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

CITIZENS TO PRESERVE OVERTON PARK,  
INC., WILLIAM W. DEUPREE, SR.,  
SUNSHINE K. SNYDER, SIERRA CLUB,  
AND NATIONAL AUDUBON SOCIETY,  
INC.,

*Plaintiffs-Appellants,*

v.

JOHN A. VOLPE, SECRETARY DEPART-  
MENT OF TRANSPORTATION, AND  
CHARLES W. SPEIGHT, COMMISSION-  
ER TENNESSEE DEPARTMENT OF  
HIGHWAYS,

*Defendants-Appellees.*

ON APPEAL from the  
United States District  
Court for the West-  
ern District of Tenn-  
essee, Western Divi-  
sion.

Decided and Filed September 29, 1970.

Before: WEICK, CELEBREZZE and PECK, Circuit Judges.

WEICK, Circuit Judge. The present action was brought by plaintiffs, Citizens to Preserve Overton Park (a corporation organized for the purpose its name implies), William W. Deupree, Sr. (a taxpayer), Sunshine K. Snyder (a taxpayer and owner of property affected by the proposed highway route), the Sierra Club (a nonprofit corporation organized for conservation of natural resources), and the Audubon Society, Inc. (also a conservation organization). The defendants are

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John A. Volpe, Secretary of Transportation, and Charles W. Speight, Commissioner of the Tennessee Department of Highways.<sup>1</sup>

The plaintiffs, claiming that Secretary Volpe had not complied with statutory mandates before releasing federal funds for an interstate highway and that administrative procedures had not been substantially followed, sought injunctive relief against Secretary Volpe prohibiting him from releasing federal funds (which represent 90% of the total cost) for the construction of a section of Interstate 40 through Overton Park, a public park in Memphis, Tennessee, and also enjoining Commissioner Speight from proceeding further on the proposed segment of the highway through Overton Park.<sup>2</sup>

The District Court granted defendants' motion for summary judgment. 309 F.Supp. 1189 (W.D. Tenn. 1970). The plaintiffs appealed. We affirm.

Overton Park is a 342 acre, municipally owned park in midtown Memphis used for a zoo, 9-hole golf course and other recreational purposes. The proposed section of the interstate highway extends in an east and west direction through the Park over the presently existing paved, non-access highway used by diesel buses which is approximately 4,800 feet in length. The existing highway is 40 to 50 feet wide. The proposed interstate will consist of six lanes — three running in

<sup>1</sup> The action was originally filed in the United States District Court for the District of Columbia solely against Secretary Volpe. Before the motion for preliminary injunction and the motion to dismiss were decided, the action was transferred to the United States District Court for the Western District of Tennessee where Commissioner Speight was made a defendant.

<sup>2</sup> While there may be some question whether the District Court had jurisdiction to enjoin Commissioner Speight, in view of our disposition of the case, it is unnecessary to decide that issue. There are cases indicating that there is jurisdiction. *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179 (6th Cir. 1967), cert. denied 390 U.S. 921 (1968); *Road Review League, Town of Bedford v. Boyd*, 270 F.Supp. 650, 663-64 (S.D. N.Y. 1967). It may well be doubted, however, whether the District Court could properly enjoin Commissioner Speight if the state desired to use its own funds to construct the highway on its own property.



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each direction, separated by a median strip approximately 40 feet wide. The interstate right-of-way will vary from approximately 250 feet in width to approximately 450 feet in width, and will require the use of approximately 26 acres of the Park. The proposed design requires that a large portion of the highway be depressed sufficiently to remove traffic from the sight of users of the Park, however, five or six feet of fill will be required where a creek runs across the right-of-way. A 1200 foot access ramp will be located within the eastern end of the park.

Because this case is on appeal from a summary judgment, the only question is whether there remains a genuine issue over any material fact in dispute. Appellants argue that there are several material facts which are genuinely disputed. They contend that it is disputed whether the Secretary made the determinations required by law before authorizing the release of federal funds.<sup>3</sup> Appellants also argue that administrative procedures were not followed because of failure to include in the notice of a public hearing any provision for the submission of written statements.

When considering a motion for summary judgment a court is required to "construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962). If, after having done that, the court is able to say there is no genuine issue as to any material fact, summary judgment is appropriate.

Although a court must be hesitant to grant summary judgment, cases challenging administrative action are ripe for summary judgment. See, e.g., *Todaro v. Pederson*, 205 F.Supp. 612, 613 (N.D. Ohio 1961), *affm'd* 305 F.2d 377 (6th

<sup>3</sup> Release of the funds was enjoined by order of this Court pending disposition of the appeal.

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Cir.), *cert. denied* 371 U.S. 891 (1962). Unlike civil actions originating in the District Court, litigants challenging administrative action are not entitled to a de novo hearing. See, e.g., *Dredge Corp. v. Penny*, 338 F.2d 456, 462 (9th Cir. 1964). Rather, in such cases the court must determine whether the administrator's decision was arbitrary and capricious. 5 U.S.C. § 706(2)(A).<sup>4</sup>

In addition to the narrow scope of review of administrative action, plaintiffs are faced with the additional burden of overcoming a presumption of regularity afforded the acts of an administrator. See *Goldberg v. Truck Drivers Local Union No. 299*, 293 F.2d 807, 812 (6th Cir.), *cert. denied* 368 U.S. 938 (1961); *Nolan v. Rhodes*, 251 F.Supp. 584, 587 (S.D. Ohio 1965), *aff'm'd* 383 U.S. 104 (1966). The presumption of regularity is a particularly strong one. See, e.g., *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453, 460 (D.C. Cir. 1967). This, of course, does not relieve the party moving for summary judgment from the burden of showing that there remains no dispute concerning any material facts. It does, however, affect the type of evidence required to carry his burden. It also makes clear that a party opposing summary judgment must do more than merely assert that the administrator's actions were unlawful. He must be able to show by affidavit, or other evidence, that there is at least a possibility that he will be able to overcome the presumption of regularity. 379 F.2d at 462.

In this case, the threshold question is whether the Secretary made the proper determinations at all, let alone whether those determinations were arbitrary and capricious.

Congress has declared it a national policy to preserve parklands and has forbidden the Secretary to approve a project which affects a park unless he first determines "(1) there is no feasible and prudent alternative to the use of such land,

<sup>4</sup> The Administrative Procedure Act is made applicable to actions of the Department of Transportation by 49 U.S.C. § 1655(h).

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and (2) such program includes all possible planning to minimize harm to such park . . . resulting from such use." 49 U.S.C. § 1653(f).<sup>5</sup>

Appellants urge that there is no evidence that the Secretary ever made the necessary two findings before authorizing the release of funds.

There is no requirement in the statute that the Secretary articulate his findings. Nor are we free to impose such a requirement on him. See *Braniff Airways, Inc. v. C.A.B.*, *supra* at 460.

We are of the opinion that the moving party introduced competent evidence tending to prove that the necessary determinations were made by the Secretary.

An affidavit was submitted on behalf of the Secretary by Edgar H. Swick. Swick was Deputy Director of Public Roads<sup>6</sup> and therefore could give competent evidence from his personal knowledge concerning the necessary determinations.<sup>7</sup>

<sup>5</sup> The text of 49 U.S.C. § 1653(f) in full is as follows:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

This same provision is contained in 23 U.S.C. § 138.

<sup>6</sup> The Bureau of Public Roads, originally a part of the Department of Commerce, was transferred to the Department of Transportation in 1967. 49 U.S.C. § 1655.

<sup>7</sup> The Secretary is authorized to act through delegates. 49 U.S.C. § 1657(e)(1).

Mr. Swick attested that the original decision with respect to the route was made in 1956 by the Bureau of Public Roads. Although the relevant statutes dealing with parklands were not in force in 1956 and, therefore, it is unlikely that the Bureau had specifically in mind the necessary requirements, subsequent determinations were made reaffirming the original decision to route along the bus highway. Mr. Swick attested:

"The location of I-40 along the bus route through Overton park was approved by the Bureau of Public Roads in 1956. All alternate alignments were rejected because of large displacements of persons, hospitals, schools, churches, and commercial establishments. For instance, the route immediately north of the park would have involved the taking of three schools, including Southwestern University and the largest high school in Memphis, plus churches attended by 4,000 people, industries, and the residences of more than 1,500 people. The route south of the park would have involved taking two schools, three churches attended by 7,500 people, 46 commercial establishments, residential units being occupied by over 3,000 persons and a hospital and home for the aged. Incidentally, the construction and right-of-way costs of the least expensive of these alternate routes would exceed the costs of the chosen route by many millions of dollars.

"The 1956 determination that the only feasible and prudent location for the highway was on the present bus route through the park was reaffirmed by Federal Highway Administrator Whitton in 1966, [Exhibit A], Federal Highway Administrator Bridwell and Secretary of Transportation Boyd in 1968, [Exhibit B], and Federal Highway Administrator Turner and Secretary of Transportation Volpe in 1969, [Exhibit C] . . . ."

The exhibits referred to consist of press releases and correspondence between various officials of the state and federal governments. Appellants challenge the admissibility of

these documents. These documents were admissible to show what was considered by the Secretary when he made his determinations. Mr. Swick's assertions that the necessary determinations were made and the reasons therefore are unchallenged by any evidence, and there is nothing to indicate that his statements could be disputed at a trial. With respect to the routing of the road, it is clear that the Secretary made the determinations required by law.

In addition to the valid reasons for choosing the route listed in the affidavit, Mr. Swick went on to point out that as of 1967, prior to the time Secretary Volpe took office, all of the right-of-way leading up to either side of the Park had been acquired and substantial work had been done. The right-of-way through the Park had also been acquired by the state from the City of Memphis, though no work on it has yet been done.<sup>8</sup> As of the time of this case, the interstate route had been excavated up to either end of the park with the resulting disruption of homes and businesses that necessarily result whenever a major highway is routed through a city. See *Nashville I-40 Steering Committee v. Ellington*, 387 F.2d 179, 185 (6th Cir. 1967), *cert. denied* 390 U.S. 921 (1968). If it were now determined that a new route be chosen (the only suggested alternatives<sup>9</sup> include businesses and residences) not only would there be additional disruption, but that already caused would have been futile and wasteful. Even assuming that the Secretary was not aware of this condition, the

<sup>8</sup> The state paid the City \$2,000,000 and acquired the legal title to the strip of land consisting of 26 acres by deed. The state paid the City an additional \$209,000 to construct additional parking areas, to move a wooden pavilion, and to relocate various utilities. The City was required by ordinance to replace any parklands taken with additional parks. The City has spent \$1,000,000 of these funds for a 160 acre golf course; \$209,000 will be spent on the zoo, and the balance of \$1,000,000 is required to be expended for other parklands.

<sup>9</sup> The fact that alternative routes can and have been suggested goes to the issue of the reasonableness of the Secretary's decision. We have indicated in the text that alternatives would now be unreasonable on the facts of this case. A discussion of reasonableness as a disputed fact is included *infra*.

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court could not ignore the social and economic impact of changing the route at this late date. See *Road Review League, Town of Bedford v. Boyd*, 270 F.Supp. 650, 664 (S.D. N.Y. (1967)).<sup>10</sup>

Appellants argue that they have introduced evidence which tends to dispute the fact that the Secretary ever made a determination that there were no feasible and prudent alternatives. Specifically they submitted as an exhibit, the testimony of Lowell K. Bridwell, the former Federal Highway Administrator who approved the route in 1968, to a Congressional committee with respect to his approval.

"We went to the city council of Memphis and we said, 'Yes, there are alternatives. We won't even give you any information on what the alternatives cost in dollars because we don't want that to be a factor in your recommendation of which line to choose. Rather, we would like you to focus upon the conflicting set of community values that are inherent in this kind of a situation.'"

Appellants contend that the Secretary merely delegated his duty to the Memphis City Council by allowing it to choose the route.

In our opinion, the testimony of Mr. Bridwell is further evidence that the Secretary complied with the statute. The legislative history of the statute makes it clear that local preferences are to be considered:

<sup>10</sup> The legislative history of the statute is revealing:

The committee would further emphasize that while the areas sought to be protected by section (4) (f) of the Department of Transportation Act and section 138 of title 23 are important, there are other high priority items which must also be weighed in the balance. The committee is extremely concerned that the highway program be carried out in such a manner as to reduce in all instances the harsh impact on people which results from the dislocation and displacement by reason of highway construction. Therefore, the use of park lands properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movement of large numbers of people. 1968 U. S. Code Cong. & Adm. News at 3500.

This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority. 1968 U.S. Code Cong. & Adm. News at 3538.

Appellants contend that the Secretary did not determine that the approved plan included "all possible planning to minimize harm" to the Park. Appellants argue that there are at least three designs which are possible and which would minimize harm to the park: a bored tunnel, a cut and cover tunnel or a highway depressed below the ground level.

The affidavit of Mr. Swick mentions all of these possibilities and the reasons for rejecting them. It is unnecessary to go into elaborate detail. However, it is basically undisputed that instead of the estimated \$3.5 million cost of the present design, a cut and cover tunnel would cost approximately \$41.5 million and a bored tunnel over \$100 million. While not controlling on whether these designs are possible, cost is certainly a legitimate consideration. Mr. Swick's affidavit also attests that not only would there be a huge price differential, but the benefits to be gained would be minimal. The Park's vegetation would not be preserved; there would be air pollution problems at the tunnel vents; there would be additional traffic hazards; and there would be serious drainage problems caused by depressing the road beneath the level of a creek that runs across the proposed right-of-way.

The affidavit makes it clear that the Secretary was fully aware of the alternative designs and chose the one now in effect. Other than appellants' bald assertion that the Secretary did not make such a finding, the evidence points to the



fact that the Secretary did determine that the proposed design included "all possible planning to minimize harm" to the Park. By introducing affidavits tending to show alternative designs, appellants really raise the issue of whether there is a genuine dispute that the Secretary's determination was arbitrary and capricious. Whether the Secretary's determination that the proposed plan included "all possible planning to minimize harm" to the Park depends on an interpretation of the word "possible." It would be unrealistic to say the Secretary must approve any possible plan no matter what the cost and engineering problems compared to whatever minimal gains. "Possible" must be interpreted within the bounds of wisdom and reasonableness.

The District Court was correct that it cannot hear de novo the determination of the Secretary. In another case involving a section of this same interstate highway, this Court has cited *Berman v. Parker*, 348 U.S. 26, 35 (1954), where the Supreme Court held: "It is not for the courts to oversee the boundary line nor sit in review on the size of a particular project area." *Nashville I-40 Steering Committee v. Ellington*, *supra* at 185. This holding applies with equal force to the design for the highway. The pleadings, affidavits and exhibits in this case make it clear that there is no factual dispute about what design was chosen and what the alternatives were. The only issue is the wisdom of the choice. Under these facts, the District Court, in our opinion, was justified in holding that the necessary determinations required by the statutes were made in good faith by the Secretary and that such determinations were not arbitrary or capricious. A trial on the issues would be an exercise in futility.<sup>11</sup>

<sup>11</sup> The case of *Medical Committee for Human Rights v. Securities and Exchange Commission*, 39 U.S.L. Week 2038, 2039 (D.C. Cir. 1970), relied on in the dissent, involved the question whether a decision of the Commission relating to proxy material was actually subject to judicial review. It does not support the thesis of the dissent that the Secretary of the Department of Transportation, whenever he approves the location, design and construction of a highway must adopt findings of fact and conclusions of law. These matters, in our judgment, involve the exercise of discretion and are review-



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Appellants contend that there was not substantial compliance with the requirements for a public hearing. 23 U.S.C. § 128 requires a state submitting plans for a federal-aid highway to conduct a public hearing and to forward a transcript of the hearing to the Secretary along with a certification by the state highway department that it "has considered the economic and social effects of such a location [of a road through a city], its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community." Relative to the notice for such hearing, the Department of Transportation issued Policy and Procedure Memorandum 20-8, 23 C.F.R., Chap. I, Part 1, § 8, which provides in relevant part:

"(2) Provision shall be made for submission of written statements and other exhibits in place of, or in addition to, oral statements at a public hearing. The procedure for such submission shall be described in the notice of public hearing and at the public hearing . . . ."

It is undisputed fact that the Tennessee Highway Department gave notice of a public hearing to be held on May 19, 1969, but that the notice failed to contain any provision for the submission of written statements. It is also undisputed that written statements were submitted.<sup>12</sup> Appellants are unable to cite a single instance in which an interested party was deprived of an opportunity to be heard, nor are they able to indicate any additional information that was not

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able only when they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2) (A).

Nor do we believe that the District Court abused its discretion by not permitting discovery for the purpose of probing the mental processes of the Secretary in arriving at his decision. *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453, 462 (D.C. Cir. 1967).

<sup>12</sup> Written statements were specifically requested and received from witnesses whose testimony was not recorded because of a failure of the recording device. The 1969 hearing was on the design. About 40 statements were filed after the hearing. A corridor hearing was held in 1961. Both hearings were well attended. Both corridor and design were approved by federal, state and city authorities.

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submitted at the hearing as a result of the deficiency in the notice. In dealing with errors committed by administrative agencies we are required to take due account of the rule of prejudicial error. 5 U.S.C. § 706; see, e.g., *Braniff Airways, Inc. v. C.A.B.*, *supra* at 465-66. We are in accord with the District Court that the failure to include a method by which to submit written statements was, on the facts of this case, harmless error.

We do not read *D.C. Federation of Civic Associations, Inc. v. Volpe*, — F.2d — (D.C.Cir. 1970) to dictate a different result. In that case no hearing at all had been provided for, while in the present case there was a very adequate hearing.

Other issues have been raised which we considered but do not deem them as meriting discussion.

The injunction pending appeal is dissolved and the judgment of the District Court is affirmed.

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CELEBREZZE, Circuit Judge, *dissenting*. For two principal reasons, I respectfully dissent from the majority's affirmance of the district court's grant of summary judgment in this case.<sup>1</sup>

<sup>1</sup> In addition to my two principal grounds for dissent, I have grave reservations about the majority's apparent holding that Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706 (1966), and the due process clause of the Fifth Amendment require no higher scope of review of the Secretary of Transportation's actions, under 23 U.S.C. § 138 (Supp. IV 1965-1968), than "arbitrary and capricious."

Congress has declared it to be

"the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." 23 U.S.C. § 138.

Title 23 requires that the communities affected by massive federally-funded highway projects be consulted at each stage of their planning and development. 23 U.S.C. § 128 (Supp. IV 1965-1968). In accordance with Congress's declaration of "national policy," the Secretary of Transportation is charged with the responsibility of reviewing the records of the public hearings held in the affected communities, and is required to consult ("shall consult and cooperate with") the Secretaries of the Interior, Housing and Urban Development, and Agriculture.

Under section 138, the Secretary is absolutely forbidden ("shall not approve") from approving "any" appropriation for a highway through a public parkland

"unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . resulting from such use." 23 U.S.C. § 138 [Emphasis added].

It is important to note that the statute does not provide, as the majority implies that it does, "unless he first determines '(1) there is . . .'" The statute provides "unless (1) there is . . ." The words "he first determines" are those of the majority, not of Congress.

The provisions of Title 23 provide the only avenue for direct citizen participation in decisions concerning the planning and construction of massive federal highway projects, decisions that may well have greater direct impact on the lives of citizens and the physical environment in which they live than any other governmental action. See *D.C. Federation of Civic Associations, Inc. v. Volpe*, No. 23,870 (D.C. Cir., Apr. 6, 1970).

"The Supreme Court has made it clear in a series of cases that the right of effective participation in the political process 'is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.' These rights, according to the Court, are 'individual and personal,' they touch a 'sensitive and important area of human rights,' and they involve the 'basic civil and political rights' of citizens. [Citations omitted.]" *Id.* Slip opinion at 11.

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First, this case is inappropriate for summary judgment. "[S]ummary judgment should be granted only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is and no genuine issue of fact remains for trial." *Rogers v. Peabody Coal Company*, 342 F.2d 749, 751 (6th Cir. 1965). "In ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962).

By perfunctorily approving a highway appropriation under section 138, the Secretary of Transportation can nullify the important procedural guarantees of Title 23, as well as render illusory the "national policy" declared by Congress. When such terrific power over environmental affairs is placed in the hands of an administrative official with minor expertise in the natural sciences, the courts must scrupulously oversee his judgment, in order to guarantee to the people of the affected communities that their words, and the words of their experts, have not merely been recorded and transcribed, but rather weighed and scrutinized in the manner of courtroom evidence.

Yet, the majority holds that the Secretary's determinations will be upheld unless "arbitrary and capricious." This holding is based, I believe, not only upon their incorrect reading of section 138 (i.e., "he first determines . . ."), but also upon a misreading of the Administrative Procedure Act. On my reading of section 10 of that Act, where an agency hearing is required by statute, an administrative decision made upon the basis of that hearing must be supported by substantial evidence. 5 U.S.C. § 706(2)(E) (1966). To digress somewhat, the Act further requires that, regardless of the scope of review, i.e., substantial evidence or arbitrary and capricious, the "court shall review the whole record or those parts of it cited by a party." The district court in this case, however, effectively precluded a review of the record on which the Secretary based his determination, assuming the Secretary did make one, by denying the Appellants access to it in discovery. How either the district court or a majority of this panel could determine whether the Secretary's determinations were arbitrary and capricious on the record as a whole, without having the record on which the Secretary based his decision, is enigmatic to me.

In any event, notwithstanding the Administrative Procedure Act, I do not believe that due process contemplates a lesser evidentiary showing when a neighborhood park is threatened by the construction of a freeway, and the health, safety, and peace of mind of a community is imperiled, than the National Labor Relations Board needs to enforce a cease and desist order against one employer who might inadvertently discriminate against one employee, or than a municipal traffic court requires to fine one parking violator.

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Even though the facts may be undisputed, if there is a dispute over the inferences to be drawn from the facts, summary judgment is not proper. *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957). See generally, 6 Moore, *Federal Practice* 2281-86 (2d ed. 1966).

The two most critical issues of fact in this case are in vigorous dispute: (a) whether the Secretary made the determinations required of him by statute (i.e., "no feasible and prudent alternative," and "all possible planning to minimize harm"); (b) whether, assuming the Secretary made those determinations, they were supported by sufficient evidence (either "substantial evidence" or, as the majority prefers, "arbitrary and capricious") on the record as a whole.<sup>2</sup> Indeed, the only facts over which there is no dispute are that the Secretary approved an appropriation for a highway through Overton Park, which is a "park" within the meaning of section 138.

(a) As the majority points out, Mr. Swick attested that in 1956 (which was, incidentally, 12 years prior to the creation of the Department of Transportation and the enactment of section 138 as it currently stands) some federal official determined that Overton Park was "the only feasible and prudent location for the highway," and that this determination was subsequently reaffirmed by Secretaries of Transportation. However, Swick's undocumented affidavit is disputed by evidence from at least two other individuals. Mr. Arlo I. Smith, an officer of the Citizens to Preserve Overton Park, swears that the Secretary made no such finding. Swick's assertion is further disputed by the transcript of testimony of Mr. Lowell K. Bridwell, a former Federal Highway Administrator, before

<sup>2</sup> As was noted above, n. 1 at p. 14, the district court denied the Appellants access to the record on which Secretary Volpe was supposed to have made his decision, by denying their motions to depose government officials. This makes a determination of whether the Secretary's judgment was supported by sufficient evidence "on the whole record" impossible, and on a motion for summary judgment, is reversible error. See generally, 6 Moore, *Federal Practice* 2397 (2d ed. 1966).

a congressional committee. Before that committee, Mr. Bridwell swore, among other things, that the decision to build the highway through the park was left "completely in the hands of the city council" of Memphis. As the principles and authorities cited above indicate, on a motion for summary judgment the district court and this court are required to "construe the evidence in its most favorable light in favor of the party opposing the motion." By no means, on a motion for summary judgment, may a court credit the affidavits of the movant over those of the party opposing the motion, unless the latter are patently false, forged, or perjured. In crediting the affidavit of Mr. Swick over the opposing documents and affidavits that were tendered on this motion for summary judgment, the district court, in my opinion, committed reversible error.

(b) Every explanation given by Mr. Swick of the reasons why other routes were neither feasible nor prudent, and why no other plan would include all possible planning to minimize harm to the park, is rebutted by affidavits and other public statements of private citizens, independent experts, and other federal and local agencies. Without attempting to review all the evidence the district court had before it on this issue, I will cite just one example. Letters from officials of the Department of the Interior, with whom the Secretary of Transportation was *statute bound* to consult, indicate that "[o]nce the park has been separated by the expressway its values have been seriously impaired," and, regarding the tunneling issue, "regardless of what type of surface design is followed there won't be much left in the way of a wooded park left in Overton Park after an interstate Highway is routed through it." There is a littany of other competent evidence that the route chosen was neither the only feasible nor prudent alternative, but that the method selected did not include all possible planning to minimize harm. This other evidence, which the majority did not even mention, should have been construed most strongly in favor of the Appellants. Again applying

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the "presumption of regularity" liberally and with unorthodox zeal, the district court and the majority of this panel credited only the affidavit presented by the movant. In doing so, I believe each committed error. A genuine issue of material fact exists as to whether, assuming the Secretary made any determination at all, his determinations that the route selected was the *only* "feasible and prudent alternative to the use of" parkland, and that the method selected included "all possible planning to minimize harm" were supported by substantial evidence on the record that we have before us (or, as the majority prefers, arbitrary and capricious).

I would remand this case to the district court for an evidentiary hearing on issues (a) and (b).

I now turn to my second ground for dissent. The Secretary acted on a hotly disputed record and could reasonably have foreseen that his actions would eventually have to be reviewed. Yet, he rendered no findings of fact and conclusions under section 138 or otherwise. Surely, if a statute requires an administrator to make absolute determinations<sup>3</sup> that are subject to review, those findings must appear in the record, and they must be sufficiently clear and complete so that the reviewing court can determine whether they are supported by sufficient evidence. *Cf. Medical Committee for Human Rights v. Securities Exchange Commission*, 39 U.S.L.W. 2038, 2039 (D.C. Cir., July 8, 1970). How a reviewing court can determine whether the Secretary's findings were supported by sufficient evidence, when the Secretary has published no findings, is a source of great puzzlement for me.

In conclusion, public parklands are the only remaining weekend sanctuaries for vast numbers of city dwellers from the polluted urban sprawl. A threat to a neighborhood parkland is a threat to the health, happiness, and peace of mind of

<sup>3</sup> Section 138 is not a statute granting broad discretionary authority. Under the statute, the Secretary "shall not" make "any" appropriation "unless (1) there is . . . ." This statute requires the Secretary's findings to be, within a fine range of reasonable human tolerances, absolute. It leaves no room for "discretion."



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all the neighborhood people. Congress recognized this fact. The Highway Act therefore requires that the public, and their experts, be consulted, and that their testimony be weighed in the manner of courtroom evidence by the federal officials responsible for funding highway projects. The Secretary has not fulfilled his duty under Title 23 simply by seeing that the requisite hearings are conducted and the necessary advice solicited. He must weigh all the evidence carefully and deliberately, and his decision must be reviewed with great scrutiny. It cannot be if it is not accompanied by findings of facts and conclusions. At the very least, procedural due process means that the people of this country be listened to, and heard, on matters affecting their daily lives as directly as the environment in which they live. Obviously, the federal courts do not have the technical expertise of roadbuilders, and they should never interfere in the technical processes of building roads. It is our solemn responsibility, however, to insure that those with technical expertise exercise it in accordance with the laws of the United States and the public welfare.

I would remand this cause to the district court with the suggestion that it treat the action as a mandamus proceeding, pursuant to the mandamus jurisdiction given it by 28 U.S.C. § 1361 (1964). I would further instruct the district court to direct the Secretary of Transportation to render findings of fact from which a reviewing court could determine whether he properly discharged his statutory responsibility. I would continue the stay this Court initially put into effect until the above course of action is completed and the Appellants have had an opportunity, if they desire, for full and effective judicial review. See *Medical Committee for Human Rights v. Securities Exchange Commission*, *supra*, 39 U.S.L.W. at 2039; *Schatten v. United States*, No. 19,233 (6th Cir. 1969).



UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

[Caption omitted in printing]

## ORDER

Before WEICK, CELEBREZZE and PECK, Circuit Judges.

Appellants have filed a petition for rehearing with a suggestion that it be heard in banc. A vote of the Circuit Judges in regular active service was taken at the request of Judge Celebrezze, but only he and Judge McCree voted in favor of an in banc hearing, and it was not ordered. The petition for rehearing is therefore properly before the panel for disposition.

On page 2 of the petition for rehearing is contained the following statement:

"1. On page 7 of the majority opinion, Judge Weick states:

'Mr. Swick's assertions that the necessary determinations were made and the reasons therefore are unchallenged by any evidence, and there is nothing to indicate that his statements could be disputed at a trial.'

The statement disregards the following *competent evidence* produced by appellants:

"(a) Challenging Mr. Swick's assertions that Secretary Volpe determined that there were no feasible and prudent alternatives, Arlo I. Smith, who has followed this controversy closely, has researched the activities of the Department of Transportation and was in frequent communication with officials of that Department, stated in paragraph 28 of his affidavit (App. No. 3)\* that:

'... defendant Volpe has made no finding that there is no feasible and prudent alternative to the use of such public park and recreation areas.' "

(Emphasis added)

The above-quoted portion of the affidavit of Arlo I. Smith is certainly positive, but the trouble is that the ellipsis therein indicates that something was omitted therefrom. An examination of Smith's affidavit in the record, for the purpose of ascertaining the omission, reveals that the portion omitted reads as follows: "On information and belief." (App. No. 3 para. 28).

Thus by restoring the omitted words to the quoted portion of Smith's affidavit, it is clear that his statement was based, not on personal knowledge, but only on information and belief. The affidavit therefore did not contain competent evidence to be considered in opposing a motion for summary judgment. It could not contradict the positive statement of facts contained in Mr. Swick's affidavit. Rule 56(e) Fed.R.Civ.P.; *Schoenbaum v. Firstbrook*, 405 F.2d 200, 209 (2d Cir. 1969); cf. *Bsharah v. Eltra Corp.*, 394 F.2d 502 (6th Cir. 1968).

In our opinion, the District Court did not abuse its discretion in denying discovery for the purpose of probing the mental processes of the Secretary. *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Sears, Roebuck & Co. v. N.L.R.B.*, \_\_\_ F.2d \_\_\_ (6th Cir. 1970); *Braniff Airways, Inc. v. C.A.B.*, 379 F.2d 453, 462 (D.C. Cir. 1967).

Appellants rely on an unreported 82-page opinion in the case of *D.C. Fed'n of Civic Ass'ns, Inc. v. Volpe*, (D.D.C. No. 2821-69, 1970), which involved the Three Rivers Bridge project and alleged political pressures not present here. In that case the District Court narrowly restricted the decision of the Supreme Court in *Morgan* and permitted interrogation of Secretary Volpe, which did indeed probe his mental processes. Until such time, however, as the Supreme Court restricts its opinion in *Morgan*, which we believe is unambiguous, we will follow it. The District Court in *D.C. Fed'n of Civic Ass'ns, supra*, did seem to agree with Chief Judge Brown, stating: "As discussed above, there is no requirement that the Secretary publicly articulate his § 138 determination." In that case the Court merely required the

Secretary to make "at least a mental finding." *Id.* n.30. Secretary Volpe testified that he did make the determinations required by Section 138 and the District Court credited his testimony; *id.* at 28.

Mr. Swick's affidavit relates what Secretary Volpe did to minimize harm. It states:

"Further, the Secretary of Transportation, in approving this project has particularly required that maximum planning be done to minimize harm to the park. [Exhibit C]. The features of this plan include, among others:

—Depression of the roadway to the maximum extent possible consistent with the requirements of drainage and possible safety in the area.

—A pedestrian crossing over the highway in the area of the zoo with a lower crown and a broad, natural looking aspect that blends with the surroundings and provide for a visual continuity.

—Exploration of other pedestrian crossings.

—Continual study of beautifying the parkway to conform with landscaping to architectural renderings reviewed by the Secretary of Transportation.

"The State has agreed to this planning to minimize harm to the park.

"With the exception of a seven-mile gap in I-40 in downtown Memphis, including Overton Park, this Interstate highway is open to traffic or nearing completion between Nashville, Tennessee, and Little Rock, Arkansas."

Conclusory statements in Smith's affidavit are unacceptable. *Bsharah v. Eltra Corp.*, *supra*.

No competent evidence was presented to the District Court or to this Court to impeach the affidavit of Mr. Swick.

Appellants have attached to their petition for rehearing Exhibit "A", which purports to be a photocopy of letter

dated August 21, 1970, from the Department of Highways of the State of Tennessee, to Mr. Frank Jordan, Chairman of Mid-Memphis Improvement Association. Since this letter was not in evidence, it is not properly before us and it is ordered stricken from the petition for rehearing.

The petition for rehearing is denied. The application for a stay is denied. Judge Celebreeze dissents.

Entered by order of the Court.

/s/ Carl W. Reuss,  
Clerk

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

[Caption omitted in printing]

**JUDGMENT**

APPEAL from the United States District Court for the Western District of Tennessee;

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefore issue out of said District Court.

Entered by order of the  
Court.

/s/ Carl W. Reuss  
Clerk

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SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1970

MONDAY, DECEMBER 7, 1970

1066 - CITIZENS TO PRESERVE OVERTON PARK, INC.  
V. VOLPE

The application for a stay presented to Mr. Justice Stewart, and by him referred to the Court, is granted pending the issuance of the judgment of this Court. Treating the application for a stay and the briefs in opposition as a petition for a writ of certiorari and opposition thereto, certiorari is granted and the case is set for oral argument on Monday, January 11, 1971. Briefs for the petitioners shall be filed by December 21, 1970, and briefs for the respondents shall be filed by January 4, 1971. These briefs may be typewritten if counsel are unable to file printed briefs by these dates. The motions of the Committee of 100 on the Federal City, Inc.; and the City of Memphis et al., for leave to file briefs, as *amici curiae*, are granted. Mr. Justice Douglas took no part in the consideration or decision of these matters.

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# Supreme Court of the United States

No. 1066 ---- , October Term, 19 70

Citizens to Preserve Overton Park,  
Inc., & al.,

Petitioners,

v.

John A. Volpe, Secretary, Department of  
Transportation, et al.

ORDER ALLOWING CERTIORARI. Filed December 7, 1970.

Treating the application for a stay as a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, certiorari is granted and the case is set for oral argument on Monday, January 11, 1971. Briefs for the petitioners shall be filed by December 21, 1970, and briefs for the respondents shall be filed by January 4, 1971. These briefs may be typewritten if counsel are unable to file printed briefs by these dates.

Mr. Justice Douglas took no part in the consideration or decision of these matters.